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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1904.

VOLUME LXXII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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In behalf of the people of Nebraska.

OCT 8 1907

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
JANUARY TERM, 1904.

**JAMES GADSDEN, APPELLEE, V. GEORGE THRUSH ET AL.,
APPELLEES, IMPEADED WITH SCHUYLER NATIONAL
BANK ET AL., APPELLANTS.**

FILED MAY 18, 1904. No. 12,533.

- 1. Appeal: REVERSAL.** It is the duty of an appellate court, upon reversing a judgment of an inferior court, to determine whether the circumstances and condition of the case require that the litigation shall be ended, or the case shall be remanded for another trial, with directions as to the further proceedings to be taken, or shall be remanded for the exercise of the discretion of the lower court.
- 2. Federal Courts: REVERSAL: AMENDMENTS.** Under the practice in the federal courts, the rule seems to be that, when the merits of the case have been once decided by the supreme court upon appeal, the circuit court has no authority, without express leave of the supreme court, to permit new defenses on the merits to be introduced by amendment to the answer.
- 3. State Courts: REVERSAL.** The rule of this court is that, when a case is reversed and remanded generally, the district court is to exercise its discretion in the further proceedings in the cause, unless otherwise specially directed by this court.
- 4. Supreme Court of the United States: REVERSAL: AMENDMENTS.** When the merits of a case have been decided by this court pursuant to the mandate of the supreme court of the United States, amendments of the answer, by introducing new defenses independent of the issues upon which the case has been determined, will not ordinarily be permitted. It is not necessary in this case to determine whether this court has jurisdiction to permit such amendments.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

A. M. Post, F. Dolezal and George H. Thomas, contra.

SEDGWICK, J.

The question before us arises upon the motion of the plaintiff, the Schuyler National Bank, for an order directing the district court to vacate its last decree entered herein, and to reinstate and enforce its first decree. The first decree of that court was, upon appeal to this court, reversed, and the cause remanded to the district court. *Gadsden v. Thrush*, 56 Neb. 565. Thereupon, a decree was entered in the district court in conformity with the judgment of this court, which, upon a second appeal to this court, was affirmed. *Gadsden v. Thrush*, 63 Neb. 881. From the judgment of this court affirming the decree of the district court, the cause was taken upon error to the supreme court of the United States, and the judgment of this court was there reversed. The decision of that court was expressed in the following language: "The judgment of the supreme court of Nebraska is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451. Upon the filing in this court of the mandate of the supreme court of the United States, the plaintiff in error in that court, who is the plaintiff here, filed this motion, and the defendant in error objected to the motion, and suggested to this court that she desired to obtain leave in the lower court to amend her answer, by adding allegations of payments made upon the note and mortgage in question before the commencement of the suit.

It seems that upon appeals in equity taken from the federal courts to the supreme court of the United States,

where the issues were fully made up in the lower court and the cause tried in the lower court upon its merits, the rule of the supreme court of the United States is:

"When the merits of a case have been once decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer." *In re Potts*, 166 U. S. 263, 17 Sup. Ct. Rep. 520. In that case, the lower court granted a rehearing on the ground of newly discovered evidence on the question of novelty in a suit for the infringement of a patent, and in such cases it seems that the rule of practice in that court is that, when the case has been determined in the lower court upon its merits, and upon appeal to the supreme court has been remanded, no amendment will be allowed setting up new defenses on the merits, "unless the right is reserved in the decree of the appellate court, or permission be given on application to that court directly for the purpose"; and in the case last cited, the court, quoting from a former decision said:

"This appears to be the practice of the court of chancery and house of lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits."

It is the duty of an appellate court to determine whether the circumstances of the case require that the litigation shall be ended, or the case shall be remanded for another trial upon the same issues, or for the exercise of the discretion of the lower court in the further proceedings. The practice in this court has been, and is, to enter a judgment in this court if the condition of the case requires it, or to remand with directions to enter judgment disposing of the case. If the reversal is general, and the cause remanded for further proceedings, without specific instructions, it is the duty of the lower court to exercise its discretion in the matter of allowing amendments, as well as

other matters in the further disposition of the case. The language used in remanding this case to this court would, if used in remanding a cause that had been appealed from the federal circuit court, no doubt, under the authority above cited, preclude that court from allowing amendments to the pleadings, unless, upon application to the supreme court, leave to reform the issues had first been obtained from that court. It is suggested that it is the writ of error or appeal, which gives that court jurisdiction in cases removed from the federal courts. And that, when a cause has been removed by writ of error from a state supreme court to the supreme court of the United States, it is the federal question involved that gives that court jurisdiction. It must appear by the record that some one of the questions stated in the statute arose in the state court, and that it was determined therein, otherwise the federal court is wholly without jurisdiction. Upon reversal, "the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so received." For these reasons it is thought that, when, as in this case, the cause is remanded to this court generally, the practice of this court ought to govern the further proceedings.

However this may be, we have looked into the record for the purpose of determining the merits of the motion before us. We think that the motion is well taken. The action has now been in the courts for about ten years. The plaintiff's case was an ordinary one for the foreclosure of a real estate mortgage. The defense was usury, and the right was insisted upon to offset payments made as usurious interest upon the principal of the loan for which the mortgage was given.

The defendant now proposes to amend her answer by alleging that, in 1893, she conveyed to plaintiff the premises involved in this litigation, and that the plaintiff then disposed of the property, and did not account to her for all of the proceeds. As a reason for not availing herself of

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this defense sooner, she shows by affidavit that her husband attended to the business for her and did not inform her, until recently, of the circumstances which entitled her to further credit.

Other matters of a similar nature are urged to explain her action in allowing the claim to be litigated during all this time without tendering this issue.

We do not think that, after trying the merits of one defense to the extreme of unusually protracted litigation, and having failed therein in a court of last resort, she is in a position to insist that the cause be remanded, with instructions to frame new issues which would be wholly independent of the issues upon which the cause has been finally determined.

The last judgment of this court and the judgment of the district court are reversed and the cause remanded, with instructions to disallow the defense of usury, and proceed to a determination thereof upon the issues as now presented, in accordance with the opinion of the supreme court of the United States.

REVERSED.

STATE OF NEBRASKA, EX REL. IGNATIUS J. DUNN, RELATOR,
v. FRANK E. MOORES, MAYOR, ET AL., RESPONDENTS.

FILED MAY 18, 1904. No. 13,552.

1. **Mandamus: DISCRETION.** It is in the discretion of this court to issue or refuse a writ of mandamus, even when a *prima facie* right thereto is shown.
2. ———: **PEREMPTORY WRIT.** A peremptory writ of mandamus will not be issued, except with a view to enforce its mandates if necessary.
3. ———: **CONCURRENT JURISDICTION.** The district court has concurrent jurisdiction, and, considering the nature of the supposed duties sought to be enforced, application should be made to that court. It is not the duty of this court to undertake to compel the performance of the things contemplated by the allegations of the alternative writ.

ORIGINAL application for a writ of mandamus to compel the mayor, chief of police and board of fire and police commissioners of the city of Omaha to enforce the provisions of the liquor law. *Dismissed.*

Ignatius J. Dunn, for relator.

C. C. Wright, Charles Ogden and W. J. Connell, contra.

SEDGWICK, J.

This is an original application to this court for a writ of mandamus against the mayor, the board of fire and police commissioners and its members, and the chief of police of the city of Omaha. Separate general demurrers are filed by the board and its members, by the mayor, and by the chief of police. The nature of the action is disclosed by the command of the alternative writ which is as follows:

"Now, therefore, we being willing that full and speedy justice be done in the premises do command you, the said John J. Donahue, chief of police of the city of Omaha, that you do forthwith arrest, or cause to be arrested, by the members of the police force of said city of Omaha, all persons engaged in, or found violating, the laws of the state of Nebraska or the ordinances of the city of Omaha, as herein referred to, by selling or giving away malt, spirituous or vinous liquors on the first day of the week, commonly called Sunday, or in keeping their places of business, commonly called saloons, where intoxicating liquors are kept for sale, open between the hours of 12 o'clock P. M. and 4 o'clock A. M., and that you take immediately such action as may be necessary and proper in the management, control and direction of said police force of the city of Omaha, to detect, or cause to be detected, any and all persons so engaged in the violation of, or so found violating, the laws of the state of Nebraska, or ordinances of the city of Omaha, within the limits of said

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city of Omaha, as above specified; and that you Frank E. Moores, as mayor of the city of Omaha, forthwith instruct and require the chief of police of the city of Omaha, and through him the police officers of said city, to arrest, or cause to be arrested, any and all persons engaged in or found violating the laws of the state of Nebraska or the ordinances of the city of Omaha, within said city of Omaha, by selling or giving away on the first day of the week, commonly called Sunday, any malt, spirituous or vinous liquors, or in keeping open a saloon where intoxicating liquors are kept for sale, between the hours of 12 o'clock P. M. and 4 o'clock A. M.; and that you, the said Frank E. Moores, ex officio chairman of the board of fire and police commissioners of the city of Omaha, William D. McHugh, William J. Broatch, Lee W. Spratlen and Joseph Thomas, members of the board of fire and police commissioners of the city of Omaha, constituting the said board of fire and police commissioners of said city of Omaha, are directed to instruct and require the chief of police of the city of Omaha, and through him the members of the police force of the city of Omaha, to arrest and take into custody, or cause to be arrested and taken into custody, all persons engaged in, or who engage in or are found, violating the laws of the state of Nebraska or the ordinances of the city of Omaha, by selling or giving away on the first day of the week, commonly called Sunday, any malt, spirituous or vinous liquors, or who keeps any saloon open between the hours of 12 o'clock P. M. and 4 o'clock A. M., where malt, spirituous and vinous liquors are kept for sale; and that you require the chief of police, and through him the members of the police force of said city of Omaha, to be vigilant in the performance of their several duties with reference to the enforcement of the laws regarding the violations thereof herein stated, and to take all steps necessary to detect any persons so engaged in the violation of said laws of the state of Nebraska and the ordinances of the said city of Omaha within said city, with reference to the selling and giving away of intoxicating

liquors on Sunday, and the keeping of such saloons open between the hours of 12 o'clock P. M. and 4 o'clock A. M., or that you, and each of you, appear before the supreme court for the state of Nebraska, on the 5th day of January, 1904, at the hour of 9 o'clock A. M., to show cause why you refuse so to do."

Two of the commissioners before whom the case was argued joined in a recommendation that this court proceed no further in this action. In their memorandum, which was prepared by Mr. Commissioner FAWCETT, Mr. Commissioner DUFFIE concurring, it was said:

"I do not wish to be understood as holding that this court has not original jurisdiction to hear and determine this case, for it is clear that it has such jurisdiction; but it is equally clear that the district court also has jurisdiction in this class of cases," and "if it should be adjudged that the writ issue in this case, and there should occur the numerous violations of its requirements which counsel predict, the district court could deal with such offenders with greater promptness and less expense than would be possible for this court."

It is not necessary to determine whether the facts alleged in the alternative writ are sufficient to enable the relator to maintain the action. A peremptory writ of mandamus will not be issued, except with the view to the enforcement of its mandates, if necessary, by the court from which it is issued. "It must be made to appear that the writ will be effectual as a remedy." *People v. Colorado C. R. Co.*, 42 Fed. 638. The reasons suggested by the commissioners are sufficient to show that it is not the duty of this court to undertake such a task. It is not necessary to support this conclusion by pointing out further reasons, which we think readily suggest themselves from the perusal of the alternative writ. This court has heretofore used its discretion in the matter of exercising its jurisdiction in mandamus cases. *State v. Lincoln Gas Co.*, 38 Neb. 33; *State v. School District*, 38 Neb. 237; *State v. Merrell*, 38 Neb. 510. The reason for refusing

to determine those cases upon their merits was, perhaps, sufficient, considering the burdened condition of the docket of this court then existing. The reasons for declining to undertake the enforcement of the mandates of the alternative writ in this case are more apparent and controlling.

We decline to proceed further in the matter, and the proceedings are therefore dismissed; but without prejudice to future proceedings.

DISMISSED.

FRANK A. AGNEW, RECEIVER, v. CARROLL S. MONTGOMERY
ET AL.

FILED MAY 18, 1904. No. 12,892.

1. **Judgment: PARTIES.** One is not concluded by a judgment or decree in a suit to which he was not a party at the time when it was rendered.
2. ———: **ESTOPPEL.** To constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded.
3. **Partnership.** An agreement between two persons, which provides that one of them shall furnish all of the property and funds necessary to carry on a business venture, and shall have the exclusive control and management thereof, and that the other shall give his time and services to the enterprise, for which he is to receive one-third of the net profits as full compensation therefor, does not create a partnership.
4. **Parol Evidence** cannot be received for the purpose of changing, modifying or explaining such a clear, plain and unambiguous written agreement.
5. **Review.** Record examined, and *held* that the evidence offered was properly received and rejected.
6. **Directing Verdict.** Where the plaintiff has the burden of proof and fails to establish all of the facts necessary to enable him to recover, it is proper for the court to direct the jury to return a verdict for the defendant.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Joel W. West, for plaintiff in error.

Hall & McCulloch, contra.

BARNES, J.

The plaintiff in error, Frank A. Agnew, as receiver, commenced this action in the district court for Douglas county, and in his petition alleged, in substance, the following facts: That defendants, Carroll S. Montgomery, Paul Charlton and Matthew A. Hall, were copartners, doing business as Montgomery, Charlton & Hall; that Phil Stimmel and Frank T. Emerson were copartners in a seed growing business, under the firm name and style of Phil Stimmel; that the copartnership aforesaid was the owner and in possession of certain goods, chattels, bills, notes, rights and credits, as follows: A certain lot of empty two bushel bags, of the value of \$240.80; of a certain account due defendant from D. M. Ferry & Company, on account of goods, wares and merchandise sold and delivered, in the sum of \$2,633.92; of a certain other account due from one Ernest Benary in the sum of \$810.56, and a certain account due from D. H. Watson of Kearney, Nebraska, in the sum of \$475.39; that the defendants obtained possession of said goods and chattels, and collected the accounts aforesaid, and converted the same unlawfully and wrongfully to their own use, to the damage of the partnership aforesaid in the sum of \$4,160.87, which demand is still unsettled and unpaid. It was further alleged: That, in a suit pending in the district court for Douglas county wherein Frank T. Emerson for himself and all other creditors was plaintiff and Phil Stimmel was defendant, the plaintiff herein was appointed receiver of said partnership assets, and was authorized, directed and required to bring suits to recover all debts owing to

said partnership; that the plaintiff had filed his bond and duly qualified as such receiver; and the petition concluded with a prayer for judgment for the sum of \$4,160.67, with interest and costs, against the defendants. To this petition the defendants filed their answer, which, in substance, denied every allegation contained therein, and concluded with the following averment: "These defendants aver that on the 6th day of January, 1894, under a judgment in their favor legally rendered by this court, they did cause execution to issue to the sheriff of Douglas county, Nebraska, against Phil Stimmel, and that under the same the property described in the plaintiff's petition was seized, subject to a prior execution, and thereafter sold; that the proceeds of said sale being insufficient to liquidate the amount of the prior judgment, no part of said proceeds were paid to these defendants; that all the acts and doings of these defendants, and the acts and doings of this court and its officers under said execution, were legal and regular." The answer concluded with a suitable prayer. Afterwards, the plaintiff filed an amended reply to said answer, setting forth matters which it was claimed constituted an estoppel against the defendants, and by which it was sought to prevent them from contesting the issues raised by said petition and answer. The substance of these matters will be mentioned and commented upon more fully and at length hereafter. On these issues the cause was tried, and, after the plaintiff had introduced his evidence, or so much thereof as the court would receive, on a motion of the defendants, the court directed the jury to return a verdict in their favor, which was accordingly done. From a judgment thereon the plaintiff prosecuted error.

It appears that on the 26th day of January, 1894, Frank T. Emerson commenced an action in the district court for Douglas county against Phil Stimmel, the Omaha National Bank and the defendants herein, by which he sought to obtain an accounting between himself and Stimmel, and enjoin the bank and the defendants from selling the prop-

erty in question on certain executions issued on judgments against Stimmel. The defendants herein answered in said suit, and on a hearing had, before the final judgment, the court dissolved and vacated the order of injunction theretofore allowed against them; and, thereupon, at their request they were dismissed from said action, and were no longer parties thereto. Afterwards, certain creditors of the parties intervened; plaintiff's petition was amended by leave of the court, at the time final judgment was rendered, so as to allege a partnership; Stimmel interposed no substantial defense, a referee was appointed who made his findings of facts, and reported them to the court, and a decree was entered declaring Emerson and Stimmel to be partners; the amounts due the several intervening creditors were determined, and the plaintiff was appointed receiver. He thereupon brought this action, and now claims that the defendants are bound by said decree, and are estopped to question the existence of a partnership between Emerson and Stimmel, or show that the property alleged to have been converted by them belonged to Stimmel individually, and was lawfully subjected to the payment of his debts.

We think the question of partnership, so far as the defendants are concerned, was an open one. On an examination of the record and decree, in the case above mentioned, it seems clear that the defendants are not bound by that judgment. The decree contains the following findings: "But in that behalf, the court further finds, that by reason of the order of the court, entered May 26, 1897, by which said defendants, the Omaha National Bank, and Montgomery, Charlton & Hall, had leave to withdraw and dismiss their petition of intervention filed May 14, 1897, and their answer and cross-petition of intervention, filed October 7, 1897, thereby the court lost jurisdiction over said defendants, the Omaha National Bank, and Montgomery, Charlton & Hall, and thereby lost jurisdiction to enter a default and a personal judgment against the said defendants, the Omaha National

Bank, and Montgomery, Charlton & Hall." So it appears that by the terms of the judgment itself, which is relied on as an estoppel, it was adjudged that defendants were not parties to the suit, and that the court had no jurisdiction over them.

It is a maxim of general jurisprudence that one is not concluded by a judgment or decree rendered in an action to which he was not a party. *State v. Chicago, R. I. & P. R. Co.*, 61 Neb. 545. The defendants were not parties to the suit at the time the decree was rendered and, of course, are not bound thereby. Going farther into the record, it also appears that the petition did not allege a partnership between Emerson and Stimmel until long after the defendants had ceased to be parties to the action; and that issue was not in the case until the petition was amended by leave of the court at the time the final judgment was rendered. It is well settled that, to constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded. *Malone v. Garver*, 3 Neb. (Unof.) 710; *Battle Creek Valley Bank v. Collins*, 3 Neb. (Unof.) 38; *Richardson v. Opelt*, 60 Neb. 180. It also appears by the records of this court, in the case of *State v. Dickinson*, 59 Neb. 753, that an application was made for a writ of mandamus to compel the trial court to enter a judgment in the action relied on as an estoppel, against the defendants herein. In denying the writ, SULLIVAN, J., speaking for the court, said:

"Emerson tendered no issue as to the conversion of partnership assets. He attempted to do so, but his effort in that direction was unsuccessful. The court denied his application for leave to file a supplemental petition, and thus excluded from the case the question which counsel now insists has been tried and resolved in relator's favor. * * * The facts stated in the finding above set out were not found on the trial of an issue between the relator and the execution creditors. There was no such issue to try in the equity cases. The court had previously

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ordered that the question of conversion be tried and determined in other suits. That order had not been rescinded. * * * The court very clearly did not intend to make a finding that would have any binding force as to the bank and Montgomery, Charlton & Hall; and had judgment been rendered against them on that finding, it would, under the circumstances, be the obvious duty of this court, in a direct proceeding, to set it aside."

It is thus shown that, not only was the question of the existence of a partnership still at large as to these defendants, but they were also at liberty to litigate the question of the conversion of the alleged partnership assets, and could do so in this action.

The foregoing question having been put in issue by the pleadings in this case, and the burden of proof being on the plaintiff, it remains for us to determine whether the trial court erred in receiving and rejecting the evidence offered by him to establish these controverted facts, and in determining its effect. The plaintiff offered, and the trial court received in evidence, the entire record and decree pleaded and relied on as an estoppel, together with oral evidence identifying the written contract between Emerson and Stimmel, by which it was claimed a co-partnership was created. When the instrument itself was offered, the court held that it was not sufficient to establish a partnership, and for that reason refused to allow it to be read to the jury. This ruling is assigned as error, and we are therefore required to determine the legal effect of that contract. Its provisions are, in substance, as follows: Phil Stimmel was to furnish all of the money necessary for expenses and purchases in the business of seed raising, without interest. Emerson was to devote his time and ability to the business, "under the direction and in the name of Phil Stimmel." Stimmel was to have the sole executive charge, direction and control of the whole of said business. Emerson was to get one-third of the net profits, as compensation in full for his services. Emerson was entitled to draw \$150 a month for a specified part of

each year, to be charged against his proportionate share of the profits, and the agreement was to continue for two years. An agreement between two persons which provides that one of them shall furnish all of the property and funds necessary to carry on a business venture, and shall have the exclusive control and management thereof, and that the other shall give his time and services to the enterprise, for which he is to receive one-third of the net profits as full compensation, does not create a partnership. *Waggoner v. First Nat. Bank*, 43 Neb. 84, 94; *Whitney v. Gretna State Bank*, 50 Neb. 438; *Garrett v. Republican Publishing Co.*, 61 Neb. 541; *Aetna Ins. Co. v. Bank of Wilcox*, 48 Neb. 544, 551. It seems quite clear that the agreement offered did not create a partnership, and the court did not err in excluding it from the consideration of the jury.

It further appears that plaintiff thereupon offered parol evidence to show what was intended by the written agreement, and how the business was in fact conducted, in order to establish the existence of a partnership between the parties. This evidence was rejected, and the ruling is assigned as error. The terms of the written contract are clear and unambiguous, no explanation of the document was required and none was admissible. Such evidence was clearly open to the objection that it tended to modify, vary or contradict the terms of the written agreement, and was therefore inadmissible. *State Bank of Ceresco v. Belk*, 56 Neb. 710; *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621; *Jarvis v. Palmer*, 11 Paige Ch. (N. Y.) 650. This rule applies to written agreements by which it is sought to establish a partnership, as well as to other written contracts. In *Miller v. Butterfield*, 79 Cal. 62, 21 Pac. 543, the court said:

"This being the proper construction of the written contract, parol evidence was inadmissible for the purpose of enlarging, or extending, or otherwise varying it; and any subsequent contract with respect to the management or

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disposal of the property to be acquired—whether in writing or by parol—was wholly immaterial.”

This rule is further supported by *Taft v. Schwamb*, 80 Ill. 289; *Pursley v. Ramsey*, 31 Ga. 403; *Couch v. Woodruff*, 63 Ala. 466; *Van Horn v. Van Horn*, 49 N. J. Eq. 327, 23 Atl. 1079. It is clear, therefore, that the trial court did not err in excluding this kind of evidence.

The plaintiff having failed to establish the fact of the existence of a partnership between Emerson and Stimmel, the evidence offered of the value of the property and accounts alleged to have been converted by defendants was properly excluded. It follows that it was the duty of the court to sustain the defendants’ motion, and direct the jury to return a verdict in their favor.

For the foregoing reasons, the judgment of the district court was right, and is therefore

AFFIRMED.

AHLRICH GOKEN ET AL. V. ELLA M. DALLUGGE.*

FILED MAY 18, 1904. No. 13,404.

1. **Review.** When it appears from a fair interpretation of the record that separate motions for a new trial were ruled upon by the district court, this court will not decline to consider separate petitions in error, merely because of a slight verbal inaccuracy in the order on the motions.
2. **Torts: HUSBAND AND WIFE.** The common law rule that a husband is liable jointly with his wife for torts committed by her in his presence, but which he did not instigate and in which he did not participate, but solely because of the marriage relation, does not exist in this state.
3. **Expert Testimony** must be based upon supposed facts of the existence of which there is evidence before the court.

ERROR to the district court for Butler county: SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

* Rehearing allowed. See opinions, pp. 22, 23, *post*.

Arthur J. Evans, C. M. Skiles, C. H. Aldrich and E. C. Strode, for plaintiffs in error.

L. H. Hastings, Matt Miller and A. M. Walling, contra.

AMES, C.

This is an action in which the defendant in error, as plaintiff in the court below, recovered a judgment in an action for damages against a husband and wife for an assault committed by the latter in the presence of the former, but without his instigation or consent and in disobedience to his expressed wishes. In the view we have taken of the case, it is not necessary to state the facts in greater detail. The verdict and judgment were for the plaintiff, and there was a joint motion for a new trial, and also separate motions by each of the defendants and separate petitions in error. Afterwards, the court entered an order overruling "the motion of the defendants Ahlrich Goken and Antje Goken to set aside the verdict, and for a new trial." It is insisted that this record, because of the use of the singular number of the word "motion," does not show that the separate motions of the defendants were called to the attention of the court and ruled upon, and that therefore no error can be availed of in this court that does not affect both defendants. We think that this would be a too liberal interpretation of the record. All the motions were filed at the same time, several months before the order overruling them was made, and it seems to us more probable that the clerk should have committed the very slight mechanical oversight of omitting a final letter from one word, than that the defendants should have been at all their care and labor, without calling their motions to the attention of the court and procuring rulings upon them. It appears to us fair to infer from the record that, when the court denied the defendants a new trial, he consciously denied it to each as well as to both of them.

The first and most important question presented is, whether a husband is liable jointly with his wife for torts committed by her in his presence, but without his instigation and against his expressed wishes and protest. We think the answer should be in the negative. We are not clear, as counsel urges, and some of the authorities cited by him assert, that the husband's liability in such cases, at the common law, grew solely out of the marital rights which he enjoyed with respect to his wife's property, and her disabilities as respected a separate estate and the obligation of contracts. There is equal reason to suppose, we think, that it had its origin, in part at least, in the personal relations of the parties, in the indissolubility of the marriage, and in the idea of guardianship of the husband over his wife's person, and his right to chastise her moderately and restrain her of her liberty; from which his responsibility for her conduct, especially in his presence, would have been almost a necessary inference. But laws and customs, and prevailing sentiments, have as effectually abolished these latter mentioned incidents of the marriage, as have statutes enabling her to have and enjoy a separate estate, trade and business, and to contract concerning it, removed the former. The wife may now be "the head of the family" as respects homestead rights and exemptions, she is equally entitled with her husband to the guardianship of the offspring of the marriage, in case of separation, and she may have an absolute divorce with alimony, almost for the asking, because of "extreme cruelty," which falls far short of personal chastisement or restraint of liberty. Even if not divorced, public sentiment will not tolerate that she be compelled to abide with him, although she be destitute of provocation or excuse for doing otherwise; and his criticism of her conduct must not exceed approval by the refined manners of "polite society." We think that so nearly a complete "emancipation" of the wife must in an equal degree emancipate the husband also, and free him from obligations that were incident to a state of law and society that has van-

ished before the progress of modern ideas. As this court say in *Kerner v. McDonald*, 60 Neb. 663:

"The old common law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in the husband; she is no longer under his domination or control. On the contrary, in law, husband and wife are now considered as equals. * * * The reason for the law of entirety having ceased, with the reason, the law itself is no more. It would seem clear that, taking the modern view of the marriage relation, there is no reason for the doctrine for estates in entirety."

And so as it is said in *Martin v. Robson*, 65 Ill. 129:

"The intention of the legislature to abrogate the common law rule, to a great degree, that husband and wife were one person, and to give the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common law rule, that the husband is liable for the torts of the wife, they have made such modification of his rights and her disabilities, as wholly to remove the reason for the liability. * * * A liability which has for its consideration rights conferred, should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved. * * * So long as the husband was entitled to the property of the wife and to her industry, so long as he had power to direct and control her, and thus prevent her from commission of torts, there was reason for his liability. The reason has ceased. The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. * * * The unity of husband and wife have been severed. They are now distinct persons, and may

have separate legal estates, contracts, debts and injuries.
* * * Her brains and hands and tongue are her own."

Culmer v. Wilson, 13 Utah, 129, announces the same conclusion though upon slightly different grounds:

"The common law rule, it will be remembered, which made the husband liable for the wife's torts, proceeded upon the ground that as the husband succeeded *jure mariti* to the entire estate of the wife, real and personal, and to the right of her earnings, so that she could not respond in damages for any wrong which she might commit, it was but right that he should respond for her, so long as the coverture continued. Such being the reason of the rule, if a statute intervenes giving the wife, during coverture, the sole control of all property owned by her * * * with the right to use and possess the same, thus taking away entirely the reason of the common law rule, it would seem, on principle, that the rule itself ought to cease, though the statute makes no mention of the husband's liability for the wife's torts, or her rights to her own personal services."

In *Norris v. Corkill*, 32 Kan. 409, the supreme court of that state reach the same result. In New York, *Fitzgerald v. Quann*, 109 N. Y. 441, and perhaps some other states, a contrary doctrine prevails, though, except in New York, it does not appear to have been distinctly announced, and the decisions which seem to uphold it are sufficiently justified by the active participation of the husband in the tort of his wife. In several of the states his common law liability has been abolished by statute. We are of the opinion, therefore, that there is insufficient evidence to support the verdict against the husband.

The assault, which was unaccompanied by personal contact, but consisted in pointing a gun at the plaintiff in a threatening manner, was alleged, and proved to the satisfaction of the jury, to have occasioned a fright which caused miscarriage. The plaintiff afterwards suffered, as she testified, severe pains and physical disabilities ex-

tending over a period of more than a year from the time of the assault to the date of the trial, and which she attributed to the abortion, but it was not otherwise shown that they resulted therefrom, except that she testified that she had never previously been afflicted in like manner or suffered a like mishap. Without other foundation, two competent physicians were produced as witnesses and permitted to testify over objection as follows:

Dr. F. W. Lester. Q. From your reading, practice, observation and experience, what would you say as to whether or not a female having a miscarriage after a period of nearly four months, as to whether or not it would permanently affect the general health of a woman?

A. It might do so and it might not. It most always affects them more or less, however.

Q. In what way, doctor?

A. In the way I have described as affecting their general health, producing symptoms of lassitude and weakness, pelvic pains, chronic discharges and conditions of that kind.

Dr. R. G. Rich. Q. From your experience and observation as a physician, what effect does a miscarriage have upon the health of a woman as to impairing her health or not?

A. I think that a woman who has had a miscarriage is seldom, if ever, in as good physical condition afterwards as she has been before.

We think this testimony should have been excluded. It is not based upon a knowledge by the witnesses, obtained by their own observation, or proved upon the trial, of the circumstances of the premature birth, or of the immediate physical injury, if any, inflicted thereby upon the plaintiff, nor what had been her personal habits, or history, or treatment subsequently thereto. It left the jury to reason from effect to cause, rather than from cause to effect, and to conjecture that, because in many cases ailments such as the plaintiff complained of were caused by miscarriage, they were caused by it in her case, al-

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though it was not shown that other causes might not have produced the same illnesses.

There are other alleged errors complained of, but the foregoing appear to be sufficient for the present disposition of the case, and without discussing them, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

The following opinion on rehearing was filed November 2, 1904. *Judgment modified:*

Review. A party will not be heard to complain in this court of the admission of testimony in the trial court, to which he made no objection or exception.

AMES, C.

This is a motion for leave to argue orally a motion for a rehearing from a decision in this case reported *ante*, p. 16. The error complained of is so manifest that oral argument could neither obscure it nor render it more plain, and would therefore be useless. The sole ground of the reversal as to the wife, Antje Goken, is the incompetency of the testimony of the physicians Lester and Rich, but we failed to observe at the time of preparing the opinion that this testimony was not objected or excepted to. If that fact was called to our notice on the argument, it failed to arrest our attention, and we also overlooked a brief mention of it in the brief accompanying the motion for a rehearing. The rule that a party cannot complain in this court of the admission of testimony to which he

has not objected and excepted is too well settled to require the citation of authorities in its support.

It is recommended that the former decision of this court, in so far as it reverses the judgment of the district court against the wife, the plaintiff in error Antje Goken, be vacated and set aside, and that as to her the judgment of the last named court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court, in so far as it reverses the judgment of the district court against the wife, the plaintiff in error Antje Goken, be vacated and set aside, and that as to her the judgment of the last named court be affirmed.

JUDGMENT MODIFIED.

The following opinion on rehearing was filed April 19, 1905. *Judgment of district court reversed:*

Action for Personal Injuries: INSTRUCTION. In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health were in fact sustained by the plaintiff.

LETTON, C.

This is a rehearing of this case formerly reported *ante*, pp. 16, 22. The facts are, perhaps, sufficiently related in the former opinion, but it may be well to state that, according to the plaintiff's testimony, the miscarriage did not result from fright alone, since it appears that, when the gun was pointed at her, she was apparently shocked for a moment by fright, and that she then turned and ran for some distance, until a corn crib intervened between her and the defendant. There was sufficient medical testimony to warrant the jury in finding that the plaintiff's

injuries were a direct result of the fright and violent physical exertion occurring at the same time.

After a careful examination of the record we are of the opinion that there was not sufficient evidence as to the existence of permanent injuries or lasting impairment of the plaintiff's health to justify the court in instructing the jury upon that point, or to warrant the jury in considering the same as an element of damage. The evidence upon this point is substantially set forth in the former opinion, and, tested by every criterion, is clearly insufficient.

It is insisted, however, by the plaintiff that the damages are not more than sufficient to fairly compensate the plaintiff for the injuries actually sustained and reasonably certain to be suffered by the plaintiff in the future, and therefore it was error without prejudice to submit the question of permanent injuries. The evidence shows that a physician was first called to the plaintiff on the 2d day of May, and that his last visit was upon the 8th day of May, when the plaintiff was still in bed, but recovering. That in all he made five visits. That from the time she was able to be about, until the time of the trial, the plaintiff was able to do her housework, and in addition to this that, during the fall of 1902 and the following winter, she husked corn during the corn husking season; that she helped in the farm work, and plowed, harrowed and hauled wheat, corn and hay, cut corn stalks and milked. It is no doubt true that the plaintiff suffered from the defendant's act, but the record shows she had been accustomed to help her husband in his farm work before the occurrence complained of, and was able to do outdoor work afterwards. The evidence falls far short of indicating such a condition of health as warranted a verdict for the amount given by the jury.

It is impossible to say how far the submission of the question of permanent injuries entered into the consideration of the jury in making up their verdict. The verdict is clearly excessive, unless based upon the theory that permanent injuries were sustained.

The judgment of the district court should be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

NEBRASKA TELEPHONE COMPANY, APPELLEE, V. CITY OF
FREMONT ET AL., APPELLANTS.

FILED MAY 18, 1904. No. 13,590.

1. **Cities: USE OF STREETS BY PUBLIC SERVICE CORPORATIONS.** When a city ordinance prescribes that permission to occupy the streets by a public service corporation shall be obtained with the consent of the mayor and council, such consent is sufficiently proved by an entry in the records of a meeting of the council presided over by the mayor, reciting that a motion granting it was offered by a member and adopted, there being nothing to indicate that the mayor dissented.
2. ———: ———: **FORFEITURE.** Forfeiture of the franchises and easements of a public service corporation in the streets can be declared and enforced only by a court of competent jurisdiction. The city claiming a forfeiture cannot be a judge in its own cause, or invade the privileges, or destroy the property of such a corporation, in the absence of judicial warrant for so doing.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Gray & Abbott, for appellants.

W. W. Morsman and Frank Dolezal, contra.

AMES, C.

In 1881, J. J. Dickey, L. H. Korty and W. J. Bigger united in an association, not incorporated, and named by them the Fremont Telephone Company. By that name

they applied to the mayor and council of the city of Fremont in session, on the 17th day of December, in that year, for permission to construct and maintain a system of poles, wires and apparatus constituting a telephone exchange, through and over the streets, avenues and alleys of the city. Having heard the application, the body instructed the city attorney to prepare an ordinance suitable to accomplish the desired purpose, and adjourned until the 19th of the month. At an adjourned meeting, held accordingly, an ordinance was duly enacted, and the following entry appears on the record of the proceedings: "On motion of Murray, a permit was granted to the Fremont Telephone Company to erect their poles and wires thereon, subject to ordinance number 77," the measure just adopted. Of sections one and two of the ordinance, which was unanimously adopted, the following is a copy:

"Section 1. That any person, company or corporation, is hereby authorized to erect poles and wires on the streets of the city of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs, upon obtaining the consent of the mayor and council of said city to such use of the streets; provided, that such poles and wires be so erected as to in no manner interfere with the public use of the streets and sidewalks of said city; and provided further, that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said city; and provided further, that the location and height of any pole or wire may at any time be changed by the council.

"Section 2. The consent of the mayor and council, provided for in the first section of this ordinance, may be given at any regular or special meeting of the council, and shall be entered upon the minutes, and such consent shall authorize the use of the streets of said city for the erection of telephone or telegraph lines, subject to such regulations as have been or may be provided by ordinance; provided that in all cases where any person is

desirous of moving any building or buildings through the streets of said city, any party owning or controlling said wires shall, after having twenty-four hours notice, raise up said wires enough to enable the ready and free movement of such buildings."

There is no question as to the authority of the city to grant the license or privilege, as by these proceedings it purported to do. Shortly afterwards the association accepted the grant, and constructed an exchange, occupying some of the streets and alleys for that purpose, and they maintained the system thereafter for the service of the citizens continuously until December, 1882, when they surrendered possession of it to the plaintiff, a corporation, in consideration of the receipt in exchange therefor of \$3,600, in par amount of its capital stock, estimated to be of that value. At that time the number of patrons of the exchange was a few score, but the plaintiff, after obtaining possession, continued in the enjoyment of it uninterruptedly and without protest until shortly before the beginning of this action in January, 1903, or for a period of 20 years. During that time it reconstructed the entire system, extending it over additional areas and increasing the number of its patrons by nearly 400. Throughout this interval, its right so to do seems never to have been questioned, and its relations with the city authorities appear to have been friendly. In so doing, the company, with the knowledge and acquiescence of the city, expended large sums of money, so that the system is now concededly of the value of \$25,000. It contracted with the plaintiff concerning the location of electric light wires, maintained by the city, so as to avoid interferences, and paid it an agreed compensation for the use of its poles for the support of wires for its fire alarm system, and continuously, from and after 1890, the city levied against and collected from it an annual occupation tax.

In December, 1902, the mayor and council adopted a resolution purporting to forbid the erection by the plaintiff of poles and wires on any part of the streets, avenues

and alleys of the city not already so in use, and to prohibit it from replacing such structures in the public ways theretofore so occupied, when by decay or usage they should become deteriorated and unfit for the transaction of the business of the exchange. Notwithstanding this prohibition, the company did erect some poles and put up some wires which the city authorities, pursuant to this resolution, caused to be cut down and destroyed, and this action was begun to restrain them from the repetition of such conduct. A temporary injunction was granted, which by final decree was made perpetual, and the city appealed to this court.

It is first contended that no valid permission was granted to the association for the construction of the system in the first instance, because the ordinance enacts that such privilege shall be granted, if at all, by the mayor and council, and the entry upon the record of the proceedings of the meeting of the council does not recite that the mayor consented thereto. But it is recited that he was present and presided at the meeting, and he presumably announced the adoption of the resolution without objection, nothing in the record indicating the contrary. The mayor and council, when in session, constitute a single collective and deliberative body, and we think that his assent to the motion is a fair inference from the entry in the minutes.

It is next contended that, even if the proceedings were sufficiently formal and complete, they amounted to a grant to the members of the association personally, and not to their successors or assigns, of a franchise having the character of an easement in, over and upon the streets, avenues and alleys of the city, and that such an easement is real property, an estate in land, which can be alienated only with the consent of the public, expressed through the legislature, and then only by means of an instrument in writing executed in conformity to the provisions of the statute relative to the conveyance of land. And it is urged that no such consent has been shown, and no such instru-

ment has been produced, and that therefore the plaintiff is a mere trespasser upon the streets, and its poles and wires unlawful obstructions and nuisances, which it is not only the right but the duty of the city authorities to remove therefrom. Granting, for the sake of discussion, the defendant's premises, we do not think that its conclusion follows therefrom. By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation. It was subject to certain conditions and regulations as to the manner of user, which are not in controversy here, and which we have not thought it necessary to set forth, and it was and is, doubtless, forfeitable for unspecified acts of abuse, abandonment and nonuser, and it may be conceded that another person or corporation cannot be legally substituted in its stead without the consent or acquiescence of the public, but if such consent had been given, the manner of the transfer would be a matter in which the public would have no interest. It is not a matter of public concern whether A conveys his land to B by deed or by livery, or whether the former permits the latter to enter and acquire the estate by adverse possession, without color of title or consent. With all that neither the public nor the grantor of A has any concern. As respects this phase of the controversy, the city stands in the attitude of A's grantor. The latter may recover possession from B if A has incurred forfeiture by breach of a valid covenant against alienation, but he cannot complain that an attempted alienation was ineffectual or void between the parties to it. Such contention, if upheld, would defeat his claim for forfeiture. For the same reasons the city cannot complain that, as between the association and the plaintiff, the attempted transfer from the former to the latter was lacking in essential formalities. Statutes and legal rules relative to the forms and instruments requisite for the creation and transfer of estates and interests in real property were made for the regulation, exclusively, of the rights and obligations of the parties to

such transactions, and of persons claiming through or under them. In this instance, the city claims adversely to both parties, the association and the plaintiff. But it is conceded by both that the plaintiff is, and for 20 years past has been, with the consent of the association, in the peaceable possession of the franchises and easements granted by the city to the latter. And that concession, we think, precludes, in this action, any necessity for an inquiry into the manner in which that possession was acquired. Let it then be assumed, but without deciding—for, in our opinion, the question is not now before the court for decision—that the transfer from the association to the plaintiff was in violation of public law, that it was an abandonment by the former, followed by nonuser of such character that it incurred thereby liability to forfeiture of its grant. Has the plaintiff, by reason of the premises, become a trespasser upon the streets of the city and its property subject to spoliation by the city authorities or by the first comer? We have been cited to no judicial decision to that effect, and are quite confident that none can be found. By hypothesis, the city made a valid grant of a valuable estate in lands and put its grantee into possession. By some means—no matter what or how—the plaintiff, to use a common law expression, became seized of that estate. The city claims that the fact and manner of its grantee's disseizin has worked a forfeiture of the estate. Can the city sit in judgment on its own cause, and execute the judgment without more ado? We think not. A city, like an individual, can recover that which it has conveyed away, only by a voluntary reconveyance or surrender, or by the judgment of a court of competent jurisdiction. The declaration and enforcement of a forfeiture are judicial acts which can be performed neither by a municipal council nor by the legislature. This is so familiar a proposition of law that little or no authority need be cited in its support, though the books are full of it. Thus says *Beach* on Private Corporations, vol. 1, sec. 45:

"It is conceded that a corporation may forfeit its charter or franchises for wilful misuser or nonuser thereof. For it is a tacit condition, annexed to the creation of every corporation, that it shall be subject to dissolution by forfeiture of its franchise for wilful misuser or nonuser in regard to matters which go to the essence of the contract between it and the state; and a proceeding upon an information in the nature of *quo warranto*, filed by the attorney general on behalf of the state, is the proper mode of trying the issue. The power of the courts in this respect is exclusive. The forfeiture of corporate charters is a penalty to be imposed by the judiciary alone. Under no circumstances can the legislature presume to declare a forfeiture. Such an usurpation of judicial powers would be hostile to one of the fundamental principles of the American system, by which the legislative, executive and judicial departments of government are required to be forever separate, and would be a denial of due process of law. For 'in these cases there are necessarily adverse parties; the questions that would arise are essentially judicial; and over them the court possesses jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without due consideration of the proper boundaries which mark the separation of legislative from judicial duties.' It follows, as a matter of course, that the legislature cannot strengthen an enactment of forfeiture by reciting therein facts which would constitute a ground for a judicial declaration of forfeiture." See also cases cited in notes.

The Fremont telephone system is not an unlawful structure but a public work of great utility. The plaintiff, if in unlawful possession, to the detriment of the public, may be ousted by appropriate judicial proceedings, but private rights and public interests alike forbid wanton destruction of the property.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

Anderson v. Kanno.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

NELS ANDERSON V. A. A. KANNO.

FILED MAY 18, 1904. No. 13,519.

1. **Review.** Action of the trial court in the admission of evidence examined and approved.
2. **Instructions** of the trial court examined, and *held* not prejudicial.
3. **Verdict.** When the verdict of the jury is rendered on conflicting testimony, it will not be set aside, unless clearly against the weight of the evidence.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, for plaintiff in error.

R. J. Millard and *C. H. Whitney*, *contra.*

OLDHAM, C.

This case is brought here for a second review on error by the plaintiff in error, who was also plaintiff in the court below. The former opinion is found in 3 Neb (Unof.) 686. At the former hearing the issues in the case were fully stated in the opinion, and need not be reiterated, as the case was tried again on the same pleadings, and supported by practically the same testimony as that contained in the bill of exceptions examined on the former review. At the prior hearing in this court the cause was reversed for an error of the trial court in placing the burden of proof of certain issues involved in the controversy on the plaintiff. At the second trial the court followed our former opinion and corrected this error, and the defendant again prevailed in the court below.

As was said in our former opinion: "It is plain from an examination of the record that the matter in dispute between these parties arose from indefinite recollections of poorly kept accounts." And the first alleged error called to our attention in the brief for plaintiff in error is as to the admission of a book, called the "storage book," in evidence, over plaintiff's objection. This "storage book" is by no means a model book of accounts, but it was made by plaintiff himself, and contained entries of the transactions of the mill with its customers, made at the time of the transactions, and contains consecutive entries, and was delivered to the defendant by plaintiff when the mill was turned over to him, under his lease, for the purpose of enabling the defendant to settle with the customers of the mill for the wheat, flour and bran which each customer had on deposit in the mill. We think, with this foundation, the court was fully justified in the admission of this book, and our attention is not called to any incorrect or misleading entry in the book that could have operated to plaintiff's prejudice in its consideration.

Paragraph 5 of instructions given by the court is objected to because too vague, but no other instruction covering the same question was requested by plaintiff, and it is not contended that any vicious principle is announced in the instruction as given. Consequently, under a well-established rule in this court, this action was not prejudicial error.

Other technical criticisms, rather than objections, are alleged against different paragraphs of the court's instructions, but our attention is directed to nothing in the least prejudicial to plaintiff's rights in any of these instructions.

It is finally urged that there is not sufficient evidence to sustain the judgment. We have examined the testimony contained in the bill of exceptions, and, while it abounds in contradictions and omissions of recollection as to many of the items in the counterclaim, yet, we are

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unable to say that the verdict of the jury was clearly wrong in this particular. This case has been twice tried to a jury in the court below, with a verdict in each instance in favor of the defendant, and as was said by BARNES, J., in the recent case of *Leidigh v. Keever*, 5 Neb. (Unof.) 207:

"It further appears that the verdict complained of is a second one rendered by a jury in this case in favor of the same party; and it should not be set aside, unless it is clearly wrong. Where different trials have resulted in verdicts for a plaintiff, the judgment of the trial court will not be reversed and set aside, unless the evidence is clearly insufficient to support it."

We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLOTTE S. FLINT, ADMINISTRATRIX, APPELLANT, v.
FRANK J. CHALOUPKA ET AL., APPELLEES.

FILED MAY 18, 1904. No. 13,544.

1. Judgment: LIEN. A judgment of the district court is not a lien upon the judgment debtor's equitable interest in real estate. *Nessler v. Neher*, 18 Neb. 649.
2. Creditor's Suit: LIEN. The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. It is of the nature of an equitable execution, and it is unnecessary to issue a legal execution upon the judgment during the pendency of the creditor's action, in order to prevent the judgment from becoming dormant so far as that specific property is concerned.

By the Court.

Unofficial Opinions of Commissioners. The opinions of the commis-

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sioners of the supreme court, designated as "unofficial," have no value as precedent or authority in the sense in which the doctrine of *stare decisis* is applied. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves.

APPEAL from the district court for Saline county:
GEORGE W. STUBBS, JUDGE. *Reversed.*

J. H. Grimm & Son and A. R. Scott, for appellant.

A. S. Sands, contra.

LETTON, C.

This was a creditor's bill brought by the appellant against the appellees in the district court for Saline county. After the note upon which the suit is based was placed in judgment, an execution was issued and returned unsatisfied, whereupon this action was begun. While this action was pending 5 years expired without the issuance of another execution, and the appellees contend that the judgment upon which it was based became dormant. The principal question discussed at the oral argument and in the briefs is whether or not this action can proceed when the judgment upon which it is based has become dormant. The appellees maintain that the lien of a judgment cannot be enforced in equity after the right to enforce the judgment at law has ceased to exist; that there is a clear distinction between a creditor's suit in aid of execution and a creditor's suit to reach property rights and interests that never were subject to and never could be taken upon execution; that, in the latter case, a lien upon the interest sought to be reached is acquired only by the bringing of the equity suit, while in the former case the judgment is a lien upon the property which the judgment debtor has fraudulently conveyed, and the creditor's suit is brought to remove an obstruction from the title, in order that the property may be levied upon and sold advantageously upon execution; that the judg-

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ment is a lien upon the property fraudulently conveyed so long as the title remains in the fraudulent grantee; that any lien the appellant ever had upon the property in controversy was the lien of the judgment, and that this creditor's action creates no lien on the property, and that, consequently, when the judgment became dormant it ceased to be a lien thereon, and could no longer be enforced either by execution or by a creditor's bill. We have given the argument of the appellees at this length so that their contention may be clearly seen.

Is a judgment a lien in this state upon the equitable interest of the debtor in real estate?

In *Rosenfield v. Chada*, 12 Neb. 25, where an action in equity was brought to subject the equitable interest of a purchaser in possession of real estate to the payment of a judgment, it was held that an equitable interest in land, coupled with actual possession, may be reached by a seizure and sale under an ordinary execution.

The next case in which this general subject was considered is *Nessler v. Ncher*, 18 Neb. 649. In this case it was first held (23 N. W. 345) that the lien of a judgment will extend to all the legal or equitable interests of the defendant in lands within the county, of which such defendant is in actual possession; but upon rehearing it was held that "a judgment in the district court is not a lien upon an equitable interest in the real estate of the debtor." This was followed in *Dworak v. More*, 25 Neb. 735; *Shoemaker v. Harvey*, 43 Neb. 75; *First Nat. Bank v. Tighe*, 49 Neb. 299; *Omaha Coal, Coke & Lime Co. v. Suesz*, 54 Neb. 379, 387; *Woolworth v. Parker*, 57 Neb. 417; and may be considered as the settled doctrine of this court.

In *Westervelt v. Hagge*, 61 Neb. 647; *Folcy v. Doyle*, 1 Neb. (Unof.) 643; *First Nat. Bank v. Gibson*, 60 Neb. 767, and *State Bank v. Bell*, 68 Neb. 517, there are certain expressions used in the opinions which might be taken to imply that a judgment is a lien upon land which has been conveyed to a third person with the intent to defraud creditors, and that it is the lien of the judgment which

is enforced by the bringing of the creditor's suit. But upon a careful examination of the points that were actually decided in these cases, it will be found that, while the language of the opinions may imply that a judgment is such a lien, in no case were the former decisions overruled, and the action taken by the court in each of these cases was not inconsistent with the prior holdings.

It is not so much what a court says in the decision of a case as that which it actually does that should be considered in applying the principles of the case as a precedent. Courts often use language in an opinion responsive to an argument of counsel of which the reader of the opinion is not cognizant and thus general statements may be given undue weight. *Williams v. Milcs*, 68 Neb. 479.

While it is said in *First Nat. Bank v. Gibson*, *supra*, "The judgment was a lien on the land, and the plaintiff had the undoubted right to make his lien effective," still this, like the language used in *State Bank v. Belk*, and *Foley v. Doyle*, *supra*, which approve of the doctrine of *Fusze v. Stern*, 17 Ill. App. 429, means, as is said in that case, that the judgment is an *equitable lien* and that the recovery of a judgment which would *in the absence of a fraudulent conveyance* be a legal lien, is all that is necessary to prove in order to have the right to maintain the action.

We have considered at this length our former decisions since it would appear from the position taken by appellees that a misapprehension of our meaning has occurred.

The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. The judgment is not a legal lien but the creditor's action is in the nature of an equitable execution and when begun creates a specific lien. This lien continues while the cause is pending and until final determination. Since it is of the nature of an execution it tolls the statute of dormancy so far as the particular property sought to be reached is concerned, and hence the issuance of a general execution upon the judgment during the pendency of the creditor's

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action is not necessary to keep the judgment alive so far as the specific property equitably levied upon by this suit is concerned. *First Nat. Bank v. Gibson*, 60 Neb. 767; *Coulson v. Galtzman*, 1 Neb. (Unof.) 502; *Cincinnati v. Hafer*, 49 Ohio St. 60.

We are cognizant of the fact that this doctrine is at variance with the position taken by the supreme court of Minnesota in *Newell v. Dart*, 28 Minn. 248, and later cases, and also with the holdings of the courts of North Dakota and South Dakota, but the provisions of the statutes of these states upon which the rule is based by their courts are not the same as those of our statute. The holding in these cases is that at the end of 10 years the judgment is void of vital force. In this state we have taken a different view as to dormant judgments; our statutes are not so broad and emphatic as to the inability to enforce a judgment after the time limited expires. We have held that a sale of real estate upon execution issued upon a dormant judgment could not be attacked collaterally after confirmation. *Gillespie v. Switzer*, 43 Neb. 772; *Link v. Connell*, 48 Neb. 574. A writ issued upon a dormant judgment is not void but voidable. Unless the bar of the statute is raised by motion or pleading it is waived. For these reasons we conclude that the decisions mentioned are not applicable in this state, and we decline to follow them.

At the trial appellant proved the rendition of the judgment, the issuance of an execution upon the same, and its return wholly unsatisfied; that the conveyances alleged to be fraudulent were executed in 1896 and 1897. It was also proved that the promissory note upon which the judgment was rendered was in the hands of an attorney for collection in July, 1896, before any of the conveyances were made. By the pleadings the close family relationship of the parties to the conveyances was admitted, which was such as to throw the burden of proof as to good faith upon them under the familiar rule of this state. After this proof was offered and received, defendants

demurred to the evidence, which demurrer was sustained by the district court. The record itself does not show the ground upon which the demurrer was sustained by the court, but it is stated in appellant's brief, and not denied by appellees, that it was upon the ground that the judgment which it sought to enforce by the creditors' suit had become dormant, and that thereby the right to maintain the action had abated.

Among the issues raised by the answers were the bankruptcy of the principal defendants, and the filing of appellant's judgment as an unsecured claim against the bankrupt estate. Since no evidence was offered or received in the district court upon these issues, and the case was decided there upon other grounds, it is unnecessary for the questions presented by the pleadings, in relation to the effect of the bankruptcy and the filing of appellant's claim, to be considered here. The demurrer to the evidence should have been overruled.

We therefore recommend that the judgment be reversed and the cause remanded to the district court for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court for further proceedings.

REVERSED.

HOLCOMB, C. J.

I do not think the prior decisions of the court afford any tenable ground for the contention that a judgment in a law action becomes a lien on the purely equitable interest of the judgment debtor in real estate, or that such interest can be reached by an execution on such judgment. I do not see the wisdom or necessity of explaining or distinguishing as to such opinions in rendering a decision on

the questions arising in the case at bar. Certainly, in the case of *Westervelt v. Hagge, supra*—a case involving the right of enforcing an attachment lien—the principle is distinctly recognized that a purely equitable interest in real estate can be reached only by invoking the aid of a court of equity. In *First Nat. Bank v. Gibson* and *State Bank v. Belk, supra*, the things decided were in respect of the time when, and the essential prerequisites upon which, a creditor's bill might be maintained. In neither was the question of the lien of a judgment on an equitable interest in real estate considered or decided. As to *Foley v. Doyle, supra*, this is an opinion of a class formulated by the supreme court commissioners which has been designated as "unofficial." Such opinions are of no value as authority or precedent. Whatever value they possess must be found in their intrinsic merits as being cogent in reasoning and sound in principle. The doctrine of *stare decisis* has no application to opinions of this character. The court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It approves only the conclusions. It is not required of the court that such opinions be cited with approval, if deemed sound in all respects, nor that an effort should be made to explain, distinguish, criticise or disapprove them when not followed in subsequent decisions in other cases brought here for its determination. The court has not necessarily approved all the propositions of law advanced as indicated either in the syllabi or in the opinions themselves. They rest on an altogether different footing from the opinions published in the official reports.

SARAH J. KELLEY, APPELLANT, v. LYMAN S. BOYER ET AL.,
APPELLEES.

FILED MAY 18, 1904. No. 13,573.

Evidence examined, and held to sustain the judgment of the district court.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

W. P. Miles and Hamer & Hamer, for appellant.

Wilcox & Halligan, contra.

LETTON, C.

On the 19th day of April, 1902, one Fidella Neumann was the owner of about 160 acres of land in Cheyenne county, Nebraska. On that day she executed a lease of the same to Lyman S. Boyer for a period of 2 years; the term ending April 1, 1904; the consideration being the sum of \$25 a year, to be paid April 1, 1903, and April 1, 1904. The lease also contained these further provisions: "In case Lyman S. Boyer shall construct a lateral from the Chimney Rock irrigation ditch to and through the said land, Mrs. Fidella Neumann agrees to pay half the expenses, not to exceed \$50, for said lateral to Lyman S. Boyer. In case Mrs. Fidella Neumann should sell the above described land before the expiration of this contract, Lyman S. Boyer agrees to give peaceable possession of this land any time to her, when the expense incurred in building lateral and loss incurred by vacating the above named land are paid. Damages shall be agreed upon by 3 disinterested parties." This lease was signed by both parties. Boyer went into possession of the premises under the lease. On April 15, 1903, Mrs. Neumann sold the land to the plaintiff and appellant, Sarah J. Kelley, who claims possession of the same under her deed from Mrs. Neumann. At the time of the sale the plaintiff

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was fully advised of the lease and of its conditions, and that Boyer was in possession thereunder. The land is not cultivated but is used as hay land. Boyer cut the hay upon it in 1902, and in 1903 was again cutting the hay upon the land when the plaintiff Kelley began this action, alleging that she was the owner of the premises; that the defendants Lyman S. Boyer and George Boyer had entered upon the land without any warrant in law or color of right, and were cutting the hay crop and appropriating it to their own use; that the defendants are insolvent, and that she has no adequate remedy at law, and praying for an injunction. Lyman S. Boyer answered, setting up his lease and claiming possession under the same. George Boyer disclaimed any interest in the premises. At the trial the court found that the action was one to enjoin a mere trespass; that an injunction does not lie to restrain the same, unless the injury is irreparable, or the defendant is insolvent; and that the injury is not irreparable and the defendant is not insolvent, and dissolved the injunction and dismissed the case. In this court the appellant urges that there had been a settlement between Boyer and Mrs. Neumann under the terms of the lease, by which Boyer gave up and surrendered his right to the possession of the land for his unexpired term; that the action of Boyer in cutting and removing the only valuable crop upon the premises, and taking away the very thing on account of which the plaintiff purchased the property, was more than a mere trespass, and that under the pleadings in the case there is no denial of the allegation in regard to the insolvency of the defendant Lyman S. Boyer, and, consequently, the allegation of insolvency in the petition must be taken as true. The burden of proof was upon the plaintiff to establish the fact that Boyer was a trespasser, as she alleges in her petition, and was upon the land without any right.

From a careful examination of the testimony, we are of the opinion that it fails affirmatively to show that a settlement was ever had between Boyer and Mrs. Neu-

mann, by which Boyer's right to compensation under the terms of the lease for a surrender of his right to the possession of the premises was ever settled, or that any agreement was ever made between him and Mrs. Neumann, whereby he was to give up his rights under the lease to the plaintiff. The evidence further fails to show that Boyer ever surrendered the possession of the premises to the plaintiff, or that she had ever exercised active ownership over the same up to the time of the beginning of this action.

The uncontradicted testimony further shows that Boyer irrigated the land in June and July of 1903, and that he kept stock from straying or trespassing upon the same so as to avoid injury to the hay crop; while there was no evidence whatever to show that the plaintiff had ever taken actual possession of the land, or exercised any actual dominion over it. The proof falls far short of sustaining the allegations of the petition, and the judgment of the district court, although based upon other grounds than those set forth in this opinion, was right and should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WALTER MOISE & COMPANY V. WILLIAM KRUG.

FILED MAY 18, 1904. No. 13,349.

Liquor License: SALE OF LIQUORS: ESTOPPEL. The holder of a saloon license, who permits other parties to conduct a business under it in his name, is not liable for liquors furnished to those other parties by one who is aware of the situation, and deals with such parties on their own credit. As against such a claim, the license holder is not estopped to deny having made the purchase.

ERROR to the district court for Douglas county: WIL-
LARD W. SLABAUGH, JUDGE. *Affirmed.*

Cooper & Dunn and S. R. Rush, for plaintiff in error.

John C. Cowin, contra.

HASTINGS, C.

There seems to be but a single question in the present case. Does public policy require that one who takes out a license as a liquor dealer at a given place, and has the business conducted in his name, not only be conclusively deemed the proprietor of the place while it continues open under his license, but held liable to the vendor for all liquors sold to any one for the purpose of resale in such business? Plaintiff brought this suit on two causes of action: (1) For a balance for liquors sold and delivered at 1024 North 16th street, Omaha, while William McAvoy was managing and operating a saloon there as defendant's agent and representative. (2) For a like balance on account of goods sold and delivered at the same place, during the year previous, while it was operated by John Goodfellow in defendant's name. The total amount of the two claims is \$1,081.44. The answer is a denial of the indebtedness, and a special denial that McAvoy and Goodfellow, or either of them, were defendant's agents, and a general denial of all allegations. The reply alleged that defendant held a lease of the building; held the license under which the saloon run, and, consequently, could not permit or authorize any other person to conduct it in his name, and was estopped from denying the agency of Goodfellow and McAvoy, or his liability for the goods bought by them for sale in the saloon. At the trial the plaintiff requested three instructions to the effect that, if the saloon was with Krug's consent, licensed in his name and he permitted Goodfellow and McAvoy to conduct it, that made them his agents, and him responsible for their purchases. The court refused these instructions,

and told the jury that, if Goodfellow and McAvoy actually were Krug's agents in making the purchase, or if Krug's actions induced the plaintiff reasonably to believe they were his agents, and the goods were sold on the faith of it, the defendant would be liable; but that, if Goodfellow and McAvoy were not agents authorized to purchase the goods on defendant's behalf, and the plaintiff had no reason to believe, and did not believe, that they were authorized to purchase on defendant's behalf, plaintiff would be compelled to look to Goodfellow and McAvoy for payment.

It is not disputed that on the instructions given, the finding of the jury is supported by the evidence. As before indicated, the sole question seems to be, whether public policy requires that one who ostensibly conducts a saloon business, and has it licensed in his name, shall be conclusively held liable for purchases as well as sales. The trial court thought not, and applied to the case the ordinary doctrines of estoppel by acts and representations. The plaintiff earnestly contends that this was error, and that the defendant should no more be allowed to deny his responsibility for purchases than for sales; that the business is conclusively admitted to have been his, and that he should be held liable for all liquor that went into it for the purpose of sale in his name. The Nebraska case which seems to be most strongly relied upon is that of *Hall v. Hart*, 52 Neb. 4. The question in *Hall v. Hart*, as stated by the court, was, "Whether one purchasing the stock and business of a licensed saloon keeper, and by agreement continuing such business ostensibly in the name of, and by virtue of the license issued to, his vendor, will be heard to claim the property so purchased when taken to satisfy an execution or order of attachment against the latter for a debt existing at the date of such transfer." It was held that the purchaser who had continued to use the license of his vendor would not be permitted to allege and prove such a fraud upon the school fund of the state, in order to replevin the property which had been levied upon as

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that of his vendor. This was on the ground that the agreement through which he must claim his title to the goods was a fraud upon public morals, and would not be permitted to be set up. There is little analogy to the present case. It even seems that the doctrine of *Hall v. Hart* would go rather against, than in favor of, the plaintiff's claim in this case. If the finding of the jury in the present case is correct, the sale of this liquor was to McAvoy and Goodfellow, made by the plaintiff with full knowledge that they were in fact conducting this business in defendant's name for their own benefit. If such action on their part, and on Krug's, was against public policy, it seems clear that plaintiff must be held to have been *particeps criminis*. Parties in *pari delicto* can hardly derive additional rights from its being a criminal transaction, if such it is. In fact, however, it would seem that the estoppel would go no further than to transactions in the way of selling. The law does not interfere in any way nor prescribe any restrictions as to the manner whereby liquor dealers shall obtain their stock. It is doubtless true that Krug would be estopped to deny that the sales made by Goodfellow and McAvoy were on his behalf. It does not seem to follow that defendant must be compelled to admit that purchases by them were his purchases. There seems nothing, either in law or public policy, which would prevent Krug's procuring all the liquor sold in the saloon from Goodfellow and McAvoy, and nothing which would prevent them from arranging to supply it and becoming personally responsible to any parties from whom it was procured. If they did so become personally liable to such parties, and the goods were sold to them and not to Krug, even if they were sold out under Krug's name and under his license, it would hardly seem to operate in any way to make him liable for them to the plaintiff.

It is recommended that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PHILIP H. ZWEIBEL, APPELLEE, v. VICTOR B. CALDWELL
ET AL., APPELLANTS.*

FILED MAY 18, 1904. No. 13,540.

1. **Review: TRANSCRIPT: NEW TRIAL.** Where a party has, without fault or neglect on his part or his attorneys', failed to obtain a transcript for a review on error in this court, a new trial will be granted, if necessary to secure him this constitutional right.
2. ———. It is not necessary to such right that error in the judgment sought to be reviewed should be alleged or proved.
3. **Evidence held** to sustain trial court's finding, that the failure to obtain a transcript of the proceedings and judgment against him for filing with his petition in error in this court was without fault or neglect on plaintiff's part.

APPEAL from the district court for Sarpy county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Hamilton & Maxwell, for appellants.

Baldrige & De Bord and *G. M. Mullins*, *contra.*

HASTINGS, C.

This is an appeal from a decree of the district court for Sarpy county entered on November 25, 1903, setting aside a judgment in ejectment of that court entered on November 2, 1901, and ordering a new trial. The findings of the trial court are that, after a trial by jury, the defendants recovered a judgment against the plaintiff here; that a motion for a new trial was filed and overruled; that Zweibel and his attorneys exercised due diligence to procure a transcript of the record in that case for the purpose

*Rehearing denied. See opinion, p. 53, *post*.

of prosecuting error to the supreme court, and were unable, through no fault of theirs, to procure it within 6 months, and the procuring of the transcript was prevented through the inability of the clerk of the court to furnish it within the time, and that Zweibel having lost his right to a review on error was therefore entitled to a new trial in the ejectment action. The defendants requested a special finding as to the employment of H. Z. Wedgwood as attorney for them in the ejectment suit, and the court found that Wedgwood, as attorney for them in the ejectment suit, was employed to assist in the trial and for no other purpose, and within 4 days after was paid for his services, which terminated his employment. There is no general finding, and, upon the record, the original ejectment judgment stands as set aside for the reason that, because of the inability of the clerk to furnish the transcript within 6 months and the inability, without fault on their part, of Zweibel or his attorneys to get it, he is entitled to a new trial, and it is allowed him.

The defendants on their appeal say, in the first place, that the petition fails to state facts sufficient to constitute a cause of action. The basis of this claim is the fact that Zweibel's petition, filed in the district court for Sarpy county, did not allege any error in the ejectment action in which the judgment was rendered; that, consequently, there was no right shown to review it, and no prejudice in the failure of the clerk to prepare a transcript. The petition shows the beginning of an action to recover certain described premises; the filing of a general denial, and a trial before Judge Baker in the Sarpy county district court; a full hearing and a verdict, it being the second trial of the case; the filing of a motion within 3 days for a new trial, which motion is alleged to have set up certain errors of the court and irregularities at the trial; "that among the errors alleged was that the verdict was contrary to law; that the verdict was not sustained by the evidence, and that the court erred in giving each of the following instructions, to wit, 1, 2, 3, 4, 5, 6, 7, 8 and 9; said in-

structions being given by the court on its own motion, and it was alleged in said motion for a new trial that the trial court erred in refusing to give each of the instructions 3, 4 and 5 asked by the defendants;" that the motion was heard and overruled, and judgment entered in November, 1901; that a bill of exceptions was ordered and prepared, signed, settled and filed within the time allowed by law; a supersedeas bond was given, and a precipe for a transcript of the petition, answer and reply, of the orders of the court and instructions requested and given, of the order refusing instructions, of the motion for new trial, of the ruling of the court on it, and of the time of the court's adjournment, filed within 3 months of the judgment; and also that the clerk had been requested a number of times, both previously and subsequently, to prepare a transcript; that the files and records were not within the control of the plaintiff, and there was no complete record; that the instructions of the court were partly typewritten and partly hand written, and could not be reproduced; that plaintiff was informed by the court's stenographer that there was no copy of the instructions in existence; that frequent demands by Zweibel and his counsel were unavailing, because the clerk could not make the transcript; that plaintiff used all possible diligence, but failed to obtain his transcript, and without fault on his part, was deprived of his appeal from said judgment to the supreme court. It is alleged that, after the time for filing the appeal had gone by, counsel for the defendants returned to the clerk the instructions of the court and some of the other files; that repeated demands had been made upon defendants' counsel for such files within the proper time, and defendants' counsel had kept the instructions and denied knowledge of their existence, and by reason of such action the clerk was unable to obtain the files, and plaintiff unable to secure his transcript.

The only allegation of any error in the ejection proceedings is the implied one embraced in the allegation that such error was set up in the motion for a new trial. There

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is no direct allegation in the petition that there was any good ground for a reversal. If the petition is to be sustained, it must be on the ground that the right to review is, in the state of Nebraska, a constitutional one, guaranteed to a party in every instance, and does not depend for its existence upon there being error in the record. A demurrer was filed to this petition and was overruled. Defendants then answered, admitting the pleadings, the trial, the verdict, the motion for a new trial and the errors assigned in it, its overruling and judgment for defendants, and the settling of a bill of exceptions. The filing of a supersedeas bond is denied for lack of information, as is also the precept for a transcript, and the allegations as to demand upon the clerk, and as to the files and records being in the possession of defendants' counsel, and also as to whether or not there had been a request of the stenographer for copy of the instructions, and the statement made by him that they could not be obtained. The other allegations of the petition were denied. The defendants also allege that their attorneys, as plaintiff well knew, had long before the month of January, 1902, full copies of all the pleadings in the action, and instructions given by the court to the jury, and the motion for a new trial; that neither plaintiff nor his counsel ever requested that they be furnished, or took any steps for the substitution of new ones in said action. It is alleged that plaintiff could have procured a certified copy of the judgment, filed the same with his bill of exceptions in this court, thereby giving this court jurisdiction, and could have gained at least 6 months' time in which to make search for the files and instructions, and have them substituted in case the originals could not be found, and plaintiff could easily have secured a hearing in the supreme court on the merits of said ejectment case, and the failure to do so was solely owing to the neglect of plaintiff and his counsel. For a reply this answer was denied, and on trial had the findings were as above indicated.

Besides the claim that no cause of action is set out, it

is further urged that the decree is not supported by the facts found. The allegations of the petition are that the inability to make the record, and consequent failure of the plaintiff to file his petition in error, was "by reason of the conduct of the counsel for the plaintiffs therein" (that is the ejectment case). This allegation has reference only to the conduct of Wedgwood. The trial court found, as we have seen, that he was paid off and discharged immediately after defendants recovered their judgment. For his acts after that time defendants were not responsible.

It is finally urged on appellant's behalf that the decree is not sustained by sufficient evidence; that the evidence, as a whole, entirely fails to establish that due diligence on plaintiff's part would not have obtained him a full transcript; that in fact the evidence discloses nothing now missing except some refused instructions, and that due diligence on the part of plaintiff and his counsel would have produced all of the rest of the missing records, and have reproduced these lost instructions, at least in substance. It does appear, however, that the instructions tendered by the plaintiff in his behalf at the hearing of the ejectment case are lost, and it appears that his counsel are unable to "reproduce" them. It also appears that the pleadings and instructions given were returned to the clerk's office by Wedgwood after the 6 months for appeal had expired. It is tolerably clear that copies of this record could have been obtained and that it was the duty of the plaintiff to secure them, but that, as to the refused instructions, they are not to be had, and none of the instructions were at hand, until they were returned by Wedgwood after the time for filing transcript had elapsed.

The constitution in guaranteeing to every litigant a review of his case in the supreme court (constitution, art. I, section 24) would seem to indicate that equity would interfere, even to the extent of granting a new trial, to preserve such a right of review, if it had been prevented without fault of the party himself. In the present case the

trial court found, and we are not prepared to say that its findings are contrary to the weight of evidence, that the right of review had been lost, without fault on the part of the complaining party, because of the failure of the clerk to make the transcript. There is no finding as to whether this was the clerk's fault or misfortune. In any event it was his duty to find the files and make the transcript. It would seem that Zweibel and his counsel had the right to depend on him for it. The jurisdiction assumed here for the granting of a new trial cannot be claimed under any recognized head of equity jurisprudence. It must be found, if at all, under section 318 of the code, and the provision of our constitution, securing to the litigant in every case a review in the court of last resort. Section 13, article I, of the constitution, providing that the court shall be open to every person for any injury done, and that he shall have a remedy, has been held to be broader than the common law, and to entitle the courts to grant a remedy whenever a wrong has been done. *State v. Elder*, 31 Neb. 165, 185. The view of the district court, that the defendant in the ejectment suit, the plaintiff here, had lost his right of review, without fault on his part, and after making all required effort to obtain it, and was therefore entitled to a new trial, is sustainable from the evidence, and should be sustained here, if the underlying doctrine is granted, that such loss of the right of review entitles one to a new trial, without the necessity of any showing of probable error sufficient to reverse the action of the court at the ejectment trial.

The expressions of this court in *Curran v. Wilcox*, 10 Neb. 449 would indicate the recognition of an absolute right to review in all cases, though in that case there was an allegation that the judgment complained of was rendered upon issues not pleaded.

In *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100, a new trial was granted for simple inability to get a bill of exceptions in the former one. It does not appear that any specific error in the judgment was pleaded, and the

case is put upon the sole ground of the constitutional right to a review.

In *Mathews v. Mulford*, 53 Neb. 252, in refusing to consider a bill of exceptions allowed, without fault of the party presenting it, after the prescribed time, the opinion says: "The remedy, if any, is by application in equity for a new trial." In all of these cases the constitutional right to a review is spoken of and treated as absolute. It is true, the question as to the necessity of some showing of error in the judgment complained of is not touched upon in any of them. In the absence of such a showing the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed.

It is recommended that the action of the trial court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the action of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed January 5, 1905. *Rehearing denied*:

1. **Review: NEW TRIAL: EQUITY.** In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault.
2. **New Trial: PLEADINGS.** It should be made to appear that an issue was presented in the pleading in the law action involving the substantial rights of the parties, and that the evidence was such as to present a fair question for the determination of a jury.
3. ———: ———. If the facts are set out showing the nature of the

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rulings complained of, it is not necessary that there should be a direct allegation that there was error in the trial at law.

4. ———: EVIDENCE: REVIEW. If the petition for a new trial is defective in that regard, and evidence is given showing the nature of the ruling complained of sufficiently to enable the court to determine that there was a substantial question of law upon the record of the former trial which the party complaining desired in good faith to present to the reviewing court, the party offering such evidence cannot be heard to object to such defect in the petition.
5. **New Trial: TRANSCRIPT: EQUITY.** If it is impossible to obtain a sufficient transcript to present the errors complained of to this court, it is not proper practice to file an imperfect transcript with a petition in error, with the purpose of afterwards procuring a complete transcript and amending the petition in error, where there is no reasonable certainty of being able to procure such amended transcript. To fail to do so is not negligence that will defeat an action in equity for a new trial.
6. **Finding: EVIDENCE.** The plaintiff in such equity action must be himself without fault. The former opinion herein that the evidence is sufficient to justify the finding of the trial court is adhered to.

SEDGWICK, J.

The appellants in this case complain of a decree in equity in the district court for Sarpy county setting aside a former judgment in an action at law in that court and granting a new trial therein. In the opinion of the commissioner upon the former hearing it was said that, in the absence of any showing of error upon the trial at law, "the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed." The reargument was ordered mainly for the purpose of further considering this statement of the law as applicable in this case. In the decisions of this court referred to by the commissioner and in other cases cited in the briefs, the precise question here discussed was not presented. The language used must be understood in the light of this fact. The constitutional guarantee is not for the purpose of enabling parties to

indulge a litigious disposition. It must undoubtedly be made to appear that there is a genuine cause to present, and that the object is to use this constitutional privilege to present in good faith a claim of right to the court of last resort for determination. If it appears that there is a genuine controversy, and that in the trial of that controversy questions were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault, equity should grant relief. This is clearly established by the decisions of this court above referred to.

1. That there was a genuine controversy between the parties sufficiently appears. The nature of the issue in the law action is set out in this petition. It is alleged that both parties introduced evidence upon the trial and that the issue was submitted to, and determined by, a jury. If the trial court had found that there was no conflict in the evidence and had directed a verdict in the law action, it might have been necessary for this plaintiff to set out so much of the record and evidence upon the trial at law as would show that there was a genuine controversy, in which the party complaining was seeking in good faith to assert an actual claim of right.

2. There is in this petition no direct allegation that there were prejudicial errors in the trial of the law action. If the facts were set out showing the nature of the rulings complained of, whether those rulings were or were not erroneous would be a conclusion of law. This petition is open to some criticism in this regard, but we think that, in view of the conditions that we find in the record, it is sufficient to support the decree. It is alleged that a motion for a new trial was filed in that action, and that it contained assignments of error. "That among the errors alleged was that the verdict was contrary to law; that the verdict was not sustained by the evidence, and that the court erred in giving each of the following instructions,

to wit, 1, 2, 3, 4, 5, 6, 7, 8 and 9; said instructions being given by the court on its own motion, and it was alleged in said motion for a new trial that the trial court erred in refusing to give each of the instructions 3, 4 and 5 asked by the defendants." No motion was made to make the petition more specific. There was a general demurrer to the petition which was overruled, and the defendant answered. This answer contained many affirmative allegations, and for reply a general denial was filed. The pleadings in the law action were in evidence, and the motion for a new trial was put in evidence by the defendants themselves. In this condition of the record, the matter must be considered as though the petition herein set out the assignments in full as contained in the motion for a new trial. This motion for a new trial was comprehensive, and in some instances the assignments were so made as to leave no doubt of the precise question which it was sought to present to the reviewing court. Thus the ruling complained of was fully shown to the court, from which the court could determine whether there was a substantial question upon the record which the party complaining desired in good faith to submit to the reviewing court.

3. It is urged that this record does not show that this plaintiff has been deprived of his right to bring the case to this court. It is admitted that he could not have obtained a transcript of the whole record necessary to a review of his case within the time limited for the commencement of his proceedings in this court, but it is said that he might have obtained a transcript of enough of the record so as to have given this court jurisdiction by filing such transcript with his petition in error. If that part of the record was lost which showed the proceedings complained of, and the transcript could not be made to show the alleged errors relied upon, it cannot be said to have been the duty of the plaintiff to institute proceedings in this court showing no ground for relief, in the hope that he might become able to amend his proceedings before a final hearing should be had in the action. There was no reason-

able certainty that the transcript could be completed, and without such certainty such proceeding would be unwarranted.

4. It was found by the trial court that the plaintiff himself was without fault, that this misfortune was not caused by any negligence of his own. In the opinion of the commissioner the evidence is reviewed and the conclusion of the trial court supported. For the reasons there given, we conclude that the finding of the trial court upon this point ought not to be disturbed.

The motion for rehearing is overruled.

REHEARING DENIED.

HENRY HUFFMAN, APPELLEE, V. J. R. RHODES, ADMINISTRATOR, APPELLANT.

FILED JUNE 9, 1904. No. 13,516.

1. **Final Order.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie.
2. **Interlocutory Order.** The order and rulings of the trial court in the case at bar, set out in the opinion, *held* to be interlocutory and not final.
3. —: **Vacating.** An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court, without compliance with the provisions of section 602 *et sequitur* of the code relating to the vacation and modification of judgments and final orders at a term subsequent to that in which rendered.
4. **Review.** Section 675 of the code does not give the right to have reviewed by the supreme court on appeal the decisions made by a county court in the settlement of the estate of a person deceased, but such decision can be here reviewed by error proceedings only. *Whalen v. Kitchen*, 61 Neb. 329.

APPEAL from the district court for Custer county:
HOMER M. SULLIVAN, JUDGE. *Dismissed.*

A. R. Humphrey and J. R. Dean, for appellant.

Homer M. Sullivan and C. L. Gutterson, contra.

HOLCOMB, C. J.

Appellee moves for a dismissal of this cause out of court, on the ground that the action is not appealable under the provisions of section 675 of the code authorizing appeals only in actions in equity. The questions presented by the motion call for a determination of the nature and character of the present action which has been removed to this court by appeal as distinguished from proceedings in error.

The controversy had its inception in the probate court, wherein was filed by the appellee a claim for several hundred dollars against the estate of one Hiram Curtis, deceased, which was then being administered upon in that tribunal. From an adverse decision by the county judge, the claimant, appellee here, appealed his case to the district court. At the time of the trial in the district court, upon issues raised by the pleadings filed in the county court and from which it is obvious that the action was one at law for the recovery of an alleged indebtedness owing by the intestate to the claimant, and after the impaneling of a jury and the introduction of evidence by both parties the record recites: "After testimony had been introduced by both parties and both parties had rested, the following order and stipulation was made: It was announced by the court that as a matter of law the court concludes that the theory upon which plaintiff sought to recover in the county court and the facts upon which he sought to recover in the county court, raised a question that the county court had no jurisdiction to determine, and that the appeal to this court also leaves this court without jurisdiction to determine said case, and for the reason that neither court had jurisdiction, the action as a claim

against the estate ought to be dismissed. Whereupon, by agreement of all parties in open court, the plaintiff is to file a petition in equity for an accounting, alleging the trusteeship and trust relations of the deceased with the plaintiff, and the suit shall proceed as an original action against the administrator to establish the trust claimed by plaintiff to be in his hands as such administrator, the administrator agreeing to file an answer and the case to be tried hereafter by the court as an equity action for an accounting. Whereupon, by the order of the court, the jury is discharged from the further consideration of said case. It is further agreed between the parties, that all costs up to this time in the county court, be paid by plaintiff." New pleadings were filed in which the intestate was sought to be charged as trustee having received and had control and the investment of certain moneys alleged to have come into his hands belonging to the claimant and for an accounting, and a trust was sought to be impressed upon the estate of the deceased for the satisfaction of such obligation. After joinder of issues under the new pleadings filed after entry of the above mentioned order, the record discloses that the cause came on again to be heard at a subsequent term of court, at which time the court found and concluded that, as a matter of law, the order hereinbefore referred to holding that the county court had no jurisdiction and that such cause could not be maintained against the estate as a debt was erroneous and wrong; and the court further concludes that since the parties agreed that said case might be tried to the court without a jury, that this court still has jurisdiction to try and determine said case upon the theory upon which it was begun in the county court. Findings were thereupon made to the effect that the estate was indebted to the plaintiff in a specified sum which it was adjudged the plaintiff was entitled to recover of and from the estate and which should be allowed out of such estate and which amount it was adjudged and decreed the plaintiff should have and recover from the defendants in the action; and

the proceedings and judgment were ordered to be certified back to the county court.

The appellant's position regarding the effect of the proceedings had and the rulings made and judgment finally rendered, of which we have heretofore made mention, can probably be best stated in the words of counsel. In the brief in resistance to the motion to dismiss it is said: "The appellant contends that any claim that Henry Huffman had against the estate of Hiram Curtis, deceased, was ended on October 28, 1902, when the court made its announcement of no jurisdiction and discharged the jury, and the parties made their agreement in open court on that date. The appellant contends that the court which made the findings and the judgment of June 19, 1903, was absolutely without jurisdiction so to do, and that his findings and his judgment and all that he did are null and void." Can it be successfully contended that the ruling of the district court to the effect that the claim of the appellee against the estate was equitable in character and not triable as a legal action, and that both the county and the district court were without jurisdiction to hear and determine the controversy as a law action or special statutory proceeding, was a final order or judgment disposing of the merits of the controversy and from which error could be prosecuted? We think not. The ruling is lacking in essential requisites necessary to constitute a final order or judgment. The court did not dismiss the action then pending on appeal from the probate court. It only announced that the claimant's cause of action being equitable in its nature, the law action ought to be dismissed for want of jurisdiction, whereupon the parties in anticipation of the final action which was about to be taken agreed that they would reform the pleadings, convert the legal action into a suit in equity and try it as an action in equity. The agreement as to costs referred only to costs made in the county court, thus leaving the costs made in the district court to await further orders or to abide the result of the suit. These rulings and orders can be regarded only as

interlocutory. They fall short of the requirements of a final order or judgment from which an appeal or error would lie had either party so desired. It can hardly be doubted, had the proceedings stopped at the point we are considering that the rights of neither party could have been regarded as having been finally adjudicated. Nothing would have been tried or determined. Say this court:

"In defining what is a final order, we approve and adopt the rule stated in the case of *Smith v. Sahler*, 1 Neb. 310, in which it is said that an order is final when it affects a substantial right and determines the action. An order is interlocutory which dissolves an injunction when the same is an incident of the action, and the substantial rights of the parties involved in the action remain undetermined; when no further action of the court is required to dispose of the cause pending, it is final. When the cause is retained for further action, as in this case, it is interlocutory." *Clark v. Fitch*, 32 Neb. 511. See also *State v. Higby*, 60 Neb. 765; *Parmele v. Schroeder*, 61 Neb. 553.

What was in fact done in the case at bar was to stay the proceedings in the legal action, and by the acquiescence of the parties, the entry of an order having for its object the transformation of the action into a suit in equity by reforming the pleadings and the further prosecution of the appellee's demand against the estate as an action in equity. No order of dismissal of the law action was entered. No order with reference to the costs incurred in the district court was made. There was in short no finality to the action taken wherein it was agreed to transform the law action into a suit in equity and to reform the pleading so as to accomplish that result. The rule invoked by appellant with respect to the vacation and modification of judgments and final orders at a subsequent term to that in which rendered, therefore, has no application to the proceedings later on taken in the case at bar. After pleadings had been filed and the action had been apparently changed to one in equity, the case was again taken up for consideration and further hearing and the court then found

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and concluded that the order directing the action to proceed as a suit in equity was wrong and erroneous and held that the court had jurisdiction to hear and determine the action as one on appeal from the judgment of the county court disallowing the claim filed by appellee against the estate, and as being a legal action or a statutory proceeding.

It was further determined that a trial on the merits should be had to the court without the intervention of a jury since the parties had by agreement waived a jury. These later rulings were in legal contemplation a reversal and vacation of the rulings first made, and annulled all that had been done in the way of transforming the action pending on appeal into one in equity, and placed the parties in the same situation in which they were before such rulings were first made. What the court then did was to hear and determine the action as pending on appeal from the county court, and under and by virtue of the jurisdiction derived by such appeal, and, as thus tried and determined, the action was in all essential characteristics a legal action and therefore not appealable under the provisions of section 675 of the code. The right of appeal of the action in the instant case as finally tried and decided is governed by the rule announced in *Whalen v. Kitchen*, 61 Neb. 329, and on the authority of that case appellant can have the judgment complained of reviewed only by proceedings in error. The appeal will have to be dismissed, which is accordingly done.

MOTION SUSTAINED.

MELVIN G. HUBBARD V. STATE OF NEBRASKA.

FILED JUNE 9, 1904. No. 13,624.

1. **New Trial: CRIMINAL CASE: EQUITY.** A court of equity will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly discovered evidence.

2. ———. The district court possesses no inherent or common law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term to that at which a verdict of guilty was found.
3. ———. The authority and jurisdiction of the district courts to grant new trials in criminal cases are derived from the statute, to which resort must be had in determining the extent of their powers regarding the subject.
4. ———. The provisions of sections 490-492 of the criminal code, regarding the granting of new trials in criminal cases on the ground of newly discovered evidence, are the exclusive source of power of the district court to grant such new trials.
5. ———. The provisions of section 318 of the code, authorizing the granting of new trials in civil actions at a subsequent term to that at which the judgment was rendered, on the ground of newly discovered evidence, are not applicable to the granting of new trials in criminal cases.

ERROR to the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

J. H. Broady and W. L. Henderson, for plaintiff in error.

W. D. Funk and Frank N. Prout, Attorney General, contra.

HOLCOMB, C. J.

The plaintiff, in the district court for Knox county, was duly prosecuted and convicted of the crime of rape upon a female under the age of consent and sentenced to imprisonment in the penitentiary for a period of 7 years. From the judgment of conviction error proceedings were prosecuted in this court, resulting in an affirmance of the judgment rendered in the trial court. *Hubbard v. State*, 65 Neb. 805.

In the same court, and at a subsequent term to that at which the conviction was had, the plaintiff commenced proceedings, by the filing of a petition and the issuance of summons, the object and purpose being to secure a new

trial on the ground of newly discovered evidence. In the main, the newly discovered evidence consisted of statements and declarations under oath since made by the prosecutrix and her father to the effect that the former was, at the time of the alleged offense, over the age of fifteen years, both having testified on the trial that she was under that age. There was also some new evidence offered tending to show that the prosecutrix was, previously to the time of the act charged, of unchaste character, which fact, in connection with the evidence as to her being over fifteen years of age, would, under the statute, if proven, establish a perfect defense to the crime of which the plaintiff was convicted. We refer to the character of the newly discovered evidence on which a new trial is sought only in a general way. Without determining its sufficiency, had the application for a new trial been seasonably presented, we shall for the present purposes assume its sufficiency, and address ourselves to a consideration and discussion of the authority and jurisdiction of the district court to grant a new trial under the application as made and at the time presented.

The criminal code, sections 490, 491, 492, contains provisions complete in all respects, authorizing and regulating new trials in criminal cases. Under these provisions, however, the application for a new trial on the ground of newly discovered evidence is required to be made at the same term at which the verdict of guilty is rendered, and on all other grounds upon which new trials may be granted at the same term and within three days of the rendition of the verdict, unless unavoidably prevented. *Ex parte Holmes*, 21 Neb. 324; *Davis v. State*, 31 Neb. 240. In the latter case, it is said:

"The provisions of the statute, limiting the time within which a motion for a new trial in a criminal case must be made, are mandatory. The court has no power to extend the time for filing such a motion beyond three days except for newly discovered evidence, unless the party 'was unavoidably prevented' from making the application in

time. If the court could grant an extension for one day, it could extend the period for one month or six months.

* * * It has been held that under section 491 of the criminal code a motion for a new trial, to avail the party filing it, must be made at the term of court at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered unless unavoidably prevented." Citing *Bradshaw v. State*, 19 Neb. 644, and *Ex parte Holmes*, 21 Neb. 324.

Are the above mentioned sections of the criminal code exclusive? Counsel for plaintiff say they are not and that resort may be had to other sources of power for the authority which it is asked shall be exercised in the case at bar. Counsel say: "We shall contend that a court of general jurisdiction has inherent power to administer justice in such a case, and if need be, will apply section 318 of the code to such a case." We do not understand counsel as arguing that the general equity jurisdiction of the district courts can be invoked for the purpose of obtaining a new trial in a criminal case, nor is it believed that respectable authority can be cited in support of the proposition. The plaintiff seeks only a new trial. Not because he is, beyond peradventure of doubt, innocent and the victim of a miscarriage of justice, but on the ground that the new evidence which he has discovered raises a reasonable probability that a second trial may result in a verdict different from the first; that, with the additional evidence, a jury might entertain a reasonable doubt of his guilt of the crime charged, and therefore acquit. But a court of equity cannot try issues arising in the prosecution of a criminal indictment and the judgment therein would be unenforceable. "Equity can neither prevent the commission of crimes, interfere with their prosecution, nor pardon a punishment." Eaton, Equity Jurisprudence, 28. In *Paulson v. State*, 25 Neb. 344, the rule is stated to be: "The doctrine that courts of equity cannot grant relief against judgments, in criminal cases, has long been established and cannot be questioned." Citing *Attorney Gen-*

cral v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) *371; *Attorney General v. Cleaver*, 18 Ves., Jr. (Eng.) 211; *Mayor v. Pilkington*, 2 Atk. (Eng.) 302; 2 Story, *Equity Jurisprudence* (13th ed.), 893. It is not to be doubted that the rule as thus stated is the correct one, and it applies with the same force to the case at bar that it does to the case cited and in which enunciated.

We find no authority for saying the district court possesses the inherent or common law power to grant a new trial in a criminal case outside of statutory authority as justice may demand. The authorities point rather to the contrary. In *Dodge v. People*, 4 Neb. 220, it is declared in the head notes: "At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgments in such cases."

In the opinion it is said by Justice MAXWELL:

"At common law, the finding of the jury of the guilt of the accused, was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits, on the motion of the accused, even where the verdict was clearly against the weight of the evidence." Citing Hilliard, *New Trials* (2d ed.), 114; *Queen v. Bertrand*, 1 L. R. P. C. 520; *King v. Fowler & Sexton*, 4 Barn. & Ald. (Eng.) *273. And continues the author: "Therefore the utmost caution was required in capital trials, in favor of life, and if an irregularity materially affecting the trial occurred to the injury of the accused, the court usually represented such matter to the crown and a pardon was granted." Citing *Commonwealth v. Green*, 17 Mass. 417.

The authority of the district courts to grant new trials in criminal cases, and especially after the term at which a conviction is had, must, we think, if existent, be found in the statute, and, if not there, the remedy is an appeal to the executive, who is clothed with the pardoning power. As a reason for differentiating regarding relief against judgments in civil and in criminal cases, it may be observed

that the judgment in the civil case, when rendered, becomes fixed and a finality, except as the courts possess jurisdiction at law or in equity to grant relief against it in a proper case, while the judgment in a criminal case, in so far as its effectiveness is concerned, is always open to modification or annulment by an appropriate appeal to the pardoning power, against the exercise of which time does not run.

Do the provisions of section 318 of the code authorize the district court to grant a new trial in a criminal case, on the ground of newly discovered evidence, on an application made at a subsequent term, but within one year from the time of the rendition of the verdict? We are of the opinion that the answer must be in the negative, for two reasons. The provisions of the criminal code relating to the granting of new trials in such cases, being full and complete and covering every branch of the subject, must, we think, be taken as expressive of the legislative will of an exclusive method of procedure, and as empowering the courts to act only when the application is brought within the terms of that statute. Again, the provisions of the code, as indicated by its title, refer only to new trials in civil actions. They do not purport to bring within their scope and purview the granting of new trials in criminal cases, nor do they, as we read them, clothe the district court with additional power respecting its authority in criminal trials. Can it be said that the legislature intended that section 318 of the code should operate as an enlargement of the authority to grant new trials in prosecutions for crime, as conferred by the criminal code? To so hold is to ignore well recognized canons of construction. Each act relates to a particular subject, and as to such subject, is a special statute, complete in all respects. The criminal code limits the time for presenting an application for a new trial on the ground of newly discovered evidence to the term of court at which the conviction was had. The code in civil actions permits such application at a subsequent term, but only within one year after the

final judgment was rendered. The jurisdiction conferred by both acts is of the same kind and character, differing only in degree. The limitations differ, otherwise the power granted is identical in both statutes. It is a well settled rule of construction that special provisions in a law relating to a particular subject matter will prevail over general provisions in other statutes so far as there is a conflict. *State v. Cornell*, 53 Neb. 556; *State v. Cornell*, 54 Neb. 72. Even if the provisions of the code relating to the subject of new trials be regarded as of general application, which obviously they should not be, yet nevertheless, the special provisions of the criminal code would, under the rule above mentioned, control, and to that statute we must look for the authority and jurisdiction to try and determine the application of the plaintiff in the case at bar. The prior decisions of this court have, we think, practically disposed of the question now under consideration. These decisions, as we read and understand them, logically determine two points: *i. e.*, the statutes must be resorted to as the source of power for the granting of new trials in criminal cases, and the provisions of sections 490-492 of the criminal code are the source of such power and must be looked to exclusively for the authority to grant relief such as is sought to be obtained in the present proceedings. In *Davis v. State*, *supra*, it is held unequivocally that the application for a new trial must be made at the term of court at which the verdict was rendered, in accordance with the provisions of the sections of the criminal code mentioned above. It is held in *Bradshaw v. State*, 19 Neb. 644:

"The grounds upon which a new trial may be granted in a criminal case are prescribed by statute, and the motion therefor must be filed at the term at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered, unless unavoidably prevented."

MAXWELL, C. J., the author of the opinion, after speaking briefly of the limitation of time for taking criminal

cases on error to the supreme court, being the same and controlled in a measure by section 318 of the code, says:

"We find no similar provisions, however, in regard to new trials. The writer desires to add that the rule permitting a petition for a new trial to be filed at any time within one year from the rendition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circumstantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises, and the motion to dismiss must be sustained."

The rule was reannounced in *Ex parte Holmes*, 21 Neb. 324. After discussing the scope and effect of the provisions respecting the granting of new trials in criminal cases, and reaching the same conclusion as in *Bradshaw v. State*, *supra*, the writer of the opinion of the court observes:

"If we are correct in this, it must follow that upon the final adjournment of the term the right to make applications for new trial cases and the court can have no jurisdiction to entertain them. And in the case at bar the jurisdiction of the district court to make orders affecting the judgment having ceased, the order granting a new trial after execution of the sentence has been commenced must be held to be void." And in closing the opinion it is said: "It may be that injustice has been done to the prisoner and that the order of the district court seemed to be demanded by the highest considerations of justice and right, yet, in the absence of any authority to make such an order, one could not be made. As said in *Bradshaw v. State*, *supra*, the rule permitting the motion for a new trial to be filed at any time within one year from the rendition of the judgment should be extended to criminal cases where serious doubts are thrown upon the correctness of

the verdict. But such is not the law and the courts are without authority to act, except as provided by law."

In none of the prior utterances of this court, do we find warrant for adopting the construction contended for by counsel for plaintiff in error as to the applicability of section 318 of the code to the granting of new trials in criminal cases, but, on the contrary, all seem to logically force us to the conclusion that the section appealed to has no application to proceedings of the character under consideration. We have been cited to no authority warranting the construction contended for, nor is it believed that any such can be found. In Colorado the supreme court has been called upon to pass upon the question here being considered, and it is there held that the provisions of the code authorizing the vacation of judgments after the term at which rendered, and within five months, which is the limitation as to time in that jurisdiction, is confined to civil actions and has no application to criminal cases. *Klink v. People*, 16 Colo. 467. In Washington, under a statute containing provisions for granting new trials in civil actions almost identical with ours, it is held by the supreme court of that state that such provisions respecting new trials are not applicable to criminal cases. *Thompson v. Washington Territory*, 1 Wash. Ter. 547.

The reasons for the rule and the principles underlying these decisions are the same in all the cases cited, whether in this or other jurisdictions, and lead irresistibly to the conclusion that the district court was without power and authority to grant to the plaintiff in error a new trial as prayed for; and its judgment denying and dismissing the application should be, and accordingly is,

AFFIRMED.

DODGE COUNTY ET AL. V. THOMAS R. ACOM ET AL.

FILED JUNE 9, 1904. No. 11,707.

1. **County Board: ASSESSMENTS: DRAINAGE DITCHES.** The county board, in fixing the assessments to pay for the construction of a drainage ditch, under the provisions of article 1, chapter 89, Compiled Statutes, 1899, acts judicially.
2. **Review: ERROR.** From its judgment and orders in that behalf, error will lie to the district court, and the judgment of that court may be reviewed on such proceedings in this court.
3. **Findings.** On a petition in error from the judgment of the county board in such a proceeding, its findings and orders are entitled to the same weight as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it appears that the evidence is insufficient to sustain them and they are clearly wrong.
4. **Former opinion, 61 Neb. 376, adhered to.**

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Rehearing. Former opinion adhered to.*

Grant G. Martin, C. C. McNis! Frank Dolczal and Robert J. Stinson, for plaintiffs in error.

E. F. Gray and George L. Loomis, contra.

BARNES, J.

Our former opinion in this case appears in 61 Neb. 376. A rehearing was allowed, and the case was argued the second time before the commission. Since that time one or more opinions have been written, but we have been unable to approve of any of them; therefore the case is again considered by the court.

On a careful examination of the record, we are satisfied with our former opinion on the question of the jurisdiction of the county board to locate the ditch and levy the assessments, and decline to again consider that matter. However,

we will briefly review the questions relating to the method of procedure in such cases, and determine whether the assessments fixed by the county board in this case should be permitted to stand. It is claimed that in our former opinion the 98 objectors were all placed on the same footing, and, because the evidence showed that some of them were benefited by the construction of the ditch, therefore the objections of all were overruled. We do not so understand the opinion. It appears that all the objectors joined in one petition in error, and, strictly speaking, we might well have followed the rule, so often announced, that where the judgment is right as to one of the joint plaintiffs it must be sustained as to all of them. It seems, however, that the objections and assignments of error, although all of them are in the same terms, were specifically made on behalf of each of the plaintiffs in error, and were so considered on the former hearing. The board, in fixing the assessments in such cases, acts judicially, and therefore its decision may be reviewed by the district court on a petition in error; and, of course, error will lie from the decision of that court to this. This was the procedure adopted in *County of Dakota v. Cheney*, 22 Neb. 437, and in *State v. Colfax County*, 51 Neb. 28. Again, on principle, a party to a suit would be entitled to prosecute error where no appeal is provided for. The act in question provides for an appeal from certain of the findings and orders of the board, but not from the order fixing the assessments. One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for. In such error proceedings the orders of the county board will be given the same weight and conclusiveness as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it clearly appears that the evidence fails to sustain them. With this rule in view, we will now consider the contention of counsel that at least some of the objectors are entitled to have the assessments set aside, because

their lands receive no benefit from the construction and maintenance of the ditch.

It is strenuously urged that the lands lying west of the ditch, and at a higher level, are not benefited, because the natural drainage is toward the east and away from such lands. The original determination of this question is confided to the county board, and we can only consider it according to the rules which obtain in error proceedings. The judgment of the board thereon is final and conclusive, provided it is sustained by the evidence. It therefore only remains for us to ascertain whether there was sufficient competent evidence before the board in this case to justify its conclusions and sustain its judgment. It appears from the record that the general character of the land in question is flat and level, with a slight fall or natural drainage to the east; that this drainage is somewhat obstructed by lateral ridges and by ditches excavated in the construction and repair of the county roads running through it. The land is covered with swales and depressions, where the waters accumulate and slowly seep away or evaporate. It is a matter of common knowledge that drainage benefits such land, but the manner and extent of such benefits are best known and understood by engineers, who are experts in the matter of sanitation and land drainage. Therefore when the engineer in charge of such work has examined the lands, has made his estimates, and reported them to the county board, in the absence of fraud, such report ought to, and does, furnish *prima facie* evidence of the benefits which will accrue to each tract of land, and such evidence is sufficient to sustain the orders of the board, unless it is overcome by competent proof to the contrary. The engineer who had charge of the improvement in question, in addition to his findings and report, stated on the witness stand that all the lands included in his report would be benefited, and that he did not know of a foot of that land but what the water falling on it would get into the ditch. It does not necessarily follow that, because some of the land does not lie on or touch-

ing the ditch, such land will not be benefited by its construction and maintenance. Where bottom land, like that described by the evidence herein, is saturated and filled with water, it takes a long time, in the course of natural drainage, or by evaporation, for it to dry and become fit for cultivation. If, however, it is situated near a well constructed ditch, the land adjacent to and touching the ditch will quickly be drained of its excess of water, and this will enable the waters falling upon adjacent lands to speedily work their way into the ditch; and such lands, though not joining or touching the ditch, will surely be benefited thereby.

It is neither necessary nor profitable to multiply reasons, because we think the statements contained in our former opinion show conclusively that there was competent evidence sufficient to sustain the findings of the board and the assessments against all of the lands in question therein. We are firmly of the opinion that the evidence contained in the bill of exceptions, together with the report of the engineer, was amply sufficient to justify us in reinstating the order of the board. Although there may be some conflict in the testimony, under the rule above announced, the order of the board should not be set aside for that reason. It follows that our former opinion was right, and is therefore adhered to.

FORMER OPINION ADHERED TO.

SEDGWICK, J., took no part in the decision.

AUGUSTA O. KLEUTSCH ET AL. V. SECURITY MUTUAL LIFE
INSURANCE COMPANY.
SECURITY MUTUAL LIFE INSURANCE COMPANY V. AUGUSTA
O. KLEUTSCH ET AL.

FILED JUNE 9, 1904. Nos. 13,191, 13,321.

1. **New Trial: DISCRETION.** The matter of granting new trials is one of sound legal discretion, and, unless it appears that in granting a new trial the court has been guilty of an abuse of discretion, its order in that behalf will be affirmed.
2. ———: **REVIEW.** Where a second trial results in the same or a like verdict as the first one, error cannot be predicated on the order granting the new trial, because the party complaining cannot be said to have been injured thereby.
3. **Instructions.** It is reversible error for the court, in its charge to the jury, to give undue prominence to a portion of the testimony by special reference thereto—to state to the jury what weight shall be given it, and comment on its strength or probative force.

ERROR to the District court for Lancaster county:
EDWARD P. HOLMES AND ALBERT J. CORNISH, JUDGES.
Order granting new trial affirmed. Judgment on second trial reversed.

Talbot & Allen, for plaintiffs in error, Kleutsch et al.

Sawyer & Snell, contra.

BARNES, J.

Augusta O. Kleutsch, by her guardian and next friend, and Katherine Kleutsch Mills, commenced an action in the district court for Lancaster county, against the Security Mutual Life Insurance Company of Lincoln, Nebraska, on a policy issued by that company on the life of one George W. Kleutsch, the plaintiffs being the beneficiaries. The case was first tried before his honor, Judge Holmes, and a verdict returned in favor of the plaintiffs for the amount

named in the policy. This verdict was set aside and a new trial granted, and from that order the plaintiffs prosecute error. The case was again tried before his honor, Judge Cornish, and a verdict again returned for the plaintiffs. From an order denying a new trial and a judgment on the verdict, the defendant prosecutes error. These two cases have been argued and presented together, and will hereafter be treated as one action.

The plaintiffs contend that the district court erred in setting aside the first verdict and granting a new trial, and this assignment of error will be first disposed of.

It is true that error will lie in some cases from the order of the district court granting a new trial. In *Tingley v. Dolby*, 13 Neb. 371, it was held that, where there is no sufficient cause for granting a new trial, the granting of the same is clearly error, and is reviewable by the supreme court. See also *Sang v. Beers*, 20 Neb. 365; *Gibson v. Gibson*, 24 Neb. 394. But it is also true that, unless it finally disposes of the case, error will not lie from an order granting a new trial. It is likewise a well settled rule of law that the granting of a new trial is largely a matter of discretion with the trial court, and unless there appears to have been a clear abuse of a legal discretion, an order granting a new trial will not be disturbed by a court of review. The grounds on which the order complained of was made were newly discovered evidence, and the insufficiency of the evidence to sustain the verdict, and from an examination of the record of the first trial we are unable to say that the court abused its discretion in granting a new trial therein. Again, in the case at bar, it appears that the new trial resulted in the same or like verdict for the plaintiffs, therefore they were not injured by the order complained of. The error, if any, was without prejudice, and the ruling is therefore affirmed.

We come now to consider the assignments of error presented by the defendant company. It appears that on the second trial the court instructed the jury as follows:

"In this case the burden of proof is upon the plaintiffs to

establish by a preponderance of evidence the payment of the second premium on the policy in suit, which premium was due November 28, 1900, and on which a grace of 30 days in payment was allowed by the terms of the policy. To prove payment the plaintiffs produced the defendant's receipt for the same. A receipt is evidence of a high grade, to be overcome only by clear and convincing testimony. On the other hand it constitutes only *prima facie* evidence of what it contains, and it is entirely competent and proper for the defendant company to show that the payment in fact was not made, and that the receipt was issued by mistake."

Defendant contends that this instruction was erroneous; that it was wrong in this, that the court should not have told the jury that "a receipt is evidence of a high grade, to be overcome only by clear and convincing testimony." And it would seem that by this statement the court called the attention of the jury directly to this part of the testimony; in fact, singled it out, commented on its character and weight, and stated that it could only be overcome by clear and convincing evidence. This must have left the impression that the testimony of the defendant's witnesses, by which they attempted to explain the existence of the receipt, how it came to be issued, and in which they stated positively that the premium which it represented was never paid, was not evidence of such a high grade as the receipt itself, and the jury might therefore well conclude that the *prima facie* evidence of payment, to wit, the receipt itself, was not overcome thereby. Whatever may be the rule in other jurisdictions, we have frequently held that it was error to single out and to direct the attention of the jury to any particular part of the evidence, and comment on its weight or probative force. In *Smith v. Gardner*, 36 Neb. 741, the question involved was, whether a certain promissory note had been paid. After the death of one of the defendants, the note was found among her papers. The plaintiff testified positively that the note had never been paid, but that the deceased had obtained possession of it

on the pretense of examining it, and thereafter fraudulently refused to surrender it. The trial court gave the following instruction: "You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment unless explained by the plaintiffs in the action." The court, speaking through Post, J., held this instruction error, and in commenting thereon said:

"We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof after maturity is *prima facie* evidence of payment, but what is denominated a presumption of payment in such a case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case. * * * Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment, but from which payment would ordinarily be the logical inference. It is therefore proper in such a case to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. It is therefore error to advise the jury that possession of a note by the maker raises a strong presumption of payment or is a strong circumstance to prove payment."

In *Smith v. Meyers*, 52 Neb. 70, which was an action for criminal conversation, the trial court refused to instruct the jury that, "if you find from the evidence that the plaintiff continued to live with his wife after he has heard of her alleged illicit connection with the defendant, the jury is justified in concluding that the plaintiff has condoned the offense of the wife, and this circumstance is entitled to great weight in considering the question of damages the plaintiff has sustained by the wrongful conduct of the defendant, provided the jury shall believe that the de-

fendant has, in fact, committed any wrong against the plaintiff."

This was assigned as error, and in determining that question the court said:

"This instruction was properly refused, because loss of comfort and society of the wife were not the only injuries for which compensatory damages could be awarded. Again, it was not the province of the court to tell the jury what circumstance was 'entitled to great weight.' It was for the jury alone to determine the weight to be given the testimony."

In *Hayden v. Frederickson*, 59 Neb. 141, the court said:

"The following instruction was given at the request of the plaintiff below: 'The court further instructs the jury that it is your duty to consider the opinion and expert evidence in this case the same as the evidence of other witnesses. However, the court further instructs you that such opinion and expert evidence is of the very lowest order, and is the least satisfactory, and the jury should not permit such opinion and expert evidence to overthrow positive and creditable evidence of creditable witnesses, who have testified in this case of their own personal knowledge.' This instruction was bad, and should not have been given. The defendants had the right to have the jury consider the testimony of their expert witnesses without any admonition from the court that 'expert evidence is of the very lowest order, and is the least satisfactory.' It was for the jury alone to determine the weight to be given such evidence."

In *Skow v. Locke*, 3 Neb. (Unof.) 176, it was said: "Complaint is next made that the trial court should not have instructed the jury as follows: 'The jury are instructed that where the testimony of witnesses is irreconcilably conflicting they should give great weight to the surrounding circumstances in determining which witness is entitled to credit.' This is complained of because it did not confine the attention of the jury to the surrounding circumstances proved at the trial, and also because it sought

to instruct them what weight to attach to these circumstances. Defendant in error replies that the instruction complained of was just as good for one party as the other and did not prejudice plaintiff in error; and also says that the cases cited by plaintiff in error are not in point on a general instruction, such as the one complained of. * * * We are constrained to think that the learned trial judge erred in expressing an opinion as to the degree of weight to be attached to the surrounding circumstances in determining the credibility of witnesses."

In *First Nat. Bank v. Lowrey*, 36 Neb. 290, where the issue was fraud, the jury was told that certain matters particularly mentioned by the instruction were strong evidence of a secret trust, and this was held prejudicial, because of the singling out of particular evidence on one side. The same rule is announced in *Gillet v. Phelps*, 12 Wis. 437; *Wilcox v. Young*, 66 Mich. 687. See also *Davis v. Lambert*, 69 Neb. 242.

It thus appears that we are fully committed to the rule that it is error to single out a particular part of the evidence and express an opinion as to its weight, its strength or its probative force. In the case at bar the only question in issue was, whether or not the premium on the policy in suit had been paid for the year 1900. The plaintiffs produced the receipt in question as their proof of such payment. The defendant produced the officers of the company who had charge of its business, as witnesses, and especially its secretary who, it was claimed, had executed and delivered the receipt, in order to explain its existence and overcome its effect. This witness testified positively that the receipt was made out by mistake and enclosed in a letter to the assured, which contained the policy as changed; that it was intended to evidence the payment of the full amount of the premium for the year 1899. In addition to such positive statement, the witness gave evidence of facts surrounding the issuance of the policy, which at least tended to corroborate his further statement that the premium for the year in question was never paid.

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With the evidence in this condition, the jury were told that the receipt was a "high grade" of evidence "to be overcome only by clear and convincing testimony." It is true that this was followed by a fairly correct statement of the law; and yet we are unable to say that the jury were not influenced to the defendant's prejudice thereby. The instruction appears to fall within the rule announced in the cases above cited, and is not distinguishable from the instructions therein condemned. It thus clearly appears that the court erred in giving the instruction quoted.

As the case will be tried again, it is neither necessary nor proper for us to comment on the weight of the evidence, or discuss any of the other assignments of error contained in the record. For the giving of the instruction complained of, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HAMILTON NATIONAL BANK ET AL., APPELLEES, V. AMERICAN
LOAN & TRUST COMPANY ET AL., APPELLANTS.

FILED JUNE 9, 1904. No. 13,411.

1. **Review: PRIOR APPEAL.** The supreme court ordinarily will not re-examine questions of law presented and determined on a prior appeal of the same cause.
2. ———: **LAW OF THE CASE.** Therefore our former holding in this case, that the American Loan & Trust Company was a banking institution, and that its stockholders have incurred the liability provided for by section 7, article 11b of the constitution, is adhered to.
3. ———: **SECOND TRIAL.** Where, on a new trial in the district court, the parties have introduced new evidence, together with that taken on the former trial, the supreme court, on a second appeal, will examine the record and evidence in order to determine controverted questions of fact.
4. **Res Judicata.** A judgment in a prior suit will not be a bar to a subsequent action unless it is shown by the record, or by clear and satisfactory evidence, that the same issue presented in the

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subsequent action was involved in the prior suit, and that both actions are between the same parties or their privies.

5. ———: **REJECTED PETITION.** The overruling of a motion for leave to file a petition in the nature of intervention, by which it is sought to raise and litigate a question not theretofore in issue in the action, and a summary refusal to allow the petition exhibited and attached to the motion to be filed, is not *res judicata* of the matters contained in the petition, so as to prevent the parties from litigating the same questions again in a regular form of action.
6. ———: **RULINES.** The same rule applies to the summary overruling of objections to the discharge of the receiver in a prior action.
7. ———: **EVIDENCE.** Evidence examined, and *held*, that the proceedings in the action in the circuit court of the United States, pleaded as an estoppel against the plaintiffs herein, are not a bar to the prosecution of this action.

APPEAL from the district court for Douglas county:
CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Montgomery & Hall, for appellants.

James H. McIntosh, contra.

BARNES, J.

This action was commenced in the district court for Douglas county, by the Hamilton National Bank and certain other designated creditors of the American Loan & Trust Company, for themselves and all others similarly situated, against that corporation and its stockholders, to settle and determine the constitutional liability of said stockholders, and fix the amount due from each of them thereunder; to appoint a receiver to collect the sums so found due, and apply the fund thus realized to the payment of certain judgments which the plaintiffs had theretofore obtained against said corporation. A trial of the case resulted in a judgment for the defendants, and the plaintiffs appealed to this court where the judgment of the trial court was reversed, and it was held that the Ameri-

can Loan & Trust Company was a banking institution, and that the stockholders thereof had incurred the double liability provided for by section 7, article 11b of the constitution. It was further held that the defense of *res judicata* or estoppel by judgment, pleaded and relied on by the defendants, was not established, and the cause was remanded for further proceedings according to law. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67. In compliance with our mandate the cause was again tried in the district court where a decree was rendered in favor of the plaintiffs in accordance with the views expressed in our opinion. From that decree the defendants have appealed, and the case is now before us a second time.

On the second trial the defendants abandoned their contention that the insolvent corporation was not a banking institution, and offered no evidence or argument on that question, but relied alone upon their former defense of estoppel or *res judicata*. No attack having been made on that part of our former judgment declaring the American Loan & Trust Company a banking institution that question must be treated as finally settled, and therefore requires no further consideration. It follows that the only question left for our determination is whether the proceedings in the United States circuit court for the district of Nebraska in the case of *John A. Ordway v. The American Loan & Trust Company*, which are pleaded by the defendants by the way of an estoppel or former adjudication, constitute a defense to this action. Ordinarily our former judgment would likewise be decisive of that question, but appellants having introduced considerable new evidence in addition to that produced by them on the former trial, it is now contended by them that we must resolve that issue in their favor. In order to correctly determine this matter it is necessary for us to look to the record of the case in the federal court. It appears that on the 10th day of May, 1894, John A. Ordway and others, stockholders in the Loan & Trust Company, commenced an action in the circuit

court of the United States for the district of Nebraska, against that corporation as a sole defendant, to secure the appointment of a receiver to take charge of and distribute its assets and wind up its affairs; that such proceedings were had therein that one Philip Potter, also a stockholder in the corporation, was appointed receiver, and in due time its affairs were wound up, and the receiver was discharged. In that action the question of the constitutional liability of the stockholders sought to be established in this suit was not in issue, and was not incidentally involved therein, because the plaintiff and the receiver were all stockholders, and of course were not seeking to establish, but were rather trying to avoid, such liability. It seems clear that the receiver was disqualified, by reason of his personal interest, from attempting to establish or enforce such a liability against himself. It further appears however, that on the 30th day of September, 1897, the Rutland County National Bank, one of the plaintiffs herein, filed a motion in that suit for leave to petition for the removal of the then receiver, and for the appointment of a substituted receiver. The petition sought to be filed was attached to the motion, and set forth that Philip Potter was a stockholder in the American Loan & Trust Company; that the petitioner was advised that the stockholders of that corporation were liable under the constitution of this state in an amount equal to the par value of the stock held by them, and that the receiver, for the reason that he was a stockholder, was not a fit person to enforce such liability. It was prayed by the petition that the receiver be removed, and a disinterested person be appointed in his place, and that the court proceed to determine the liability of the stockholders of the corporation in accordance with the facts set forth therein. It appears from the evidence that the question of the liability of the stockholders, which is contended for by the plaintiffs in this action, was argued and discussed at least at some length on the hearing. The court, however, overruled the motion and denied the bank the right to file its said petition. So it may be

said that instead of allowing that matter to be made an issue in the action, the court refused to permit the same, or to allow the question to be litigated in that proceeding. So it cannot be claimed by the appellants that thus far the proceedings in the circuit court amounted to an adjudication of the question as to whether or not the American Loan & Trust Company was a banking institution. At the time of the filing of this motion none of the plaintiffs had presented or proved their claims against the trust company; they had not been made parties to the suit, and, aside from recognizing the proceedings by taking receiver's certificates for the amount of their claims, had made no appearance in the case. It further appears that when the question of the discharge of the receiver came up, the plaintiffs, or at least some of them, appeared, and by motion objected to his discharge, and assigned as one of the reasons therefor, that the Loan & Trust Company was a banking institution, and that its stockholders had incurred the double liability sought to be enforced in this action, and again asked that the receivership be continued, and that a disinterested person be appointed receiver to take the proper proceedings to enforce such liability. It is true that on the hearing of this motion the question was again argued to some extent, but the result of the matter was that the motion was overruled; the plaintiffs were denied the right to file petitions of intervention, and thus raise and litigate that question, and the receiver was discharged. The court, however, did not dismiss the action, but continued it for the sole purpose of allowing the plaintiffs to prove and establish the amount of their claims against the corporation. In our former opinion it is said, regarding this contention, that the motion seems to have presented the single question of removing the receiver and appointing another who was not a stockholder in the corporation. It is true that the petition tendered with the motion, foreshadowed the desire to have proceedings to enforce the liability of the stockholders instituted in a proper manner by a substituted receiver. But it cannot be successfully contended

that the question of the liability of the stockholders was presented to the court for adjudication by this motion. The exact amounts due from the corporation to its various and numerous creditors were not judicially determined at that time; plaintiffs had not either proven their claims before the receiver, or obtained judgment thereon, and were not then in a position to ask the enforcement of the stockholders' liability. The ruling on this motion was simply on the question as to whether the then acting receiver should be discharged and one appointed who should in no way be disqualified, by reason of adverse interests, to enforce the stockholders' liability. The same may be said as to the objections to the final discharge of the receiver. The question of the stockholders' liability was not then in issue, but was one which might have been put in issue had the objections been sustained and leave given the plaintiffs to file their petition.

To show that the liability of the stockholders was in fact litigated, the appellants called the district judge, before whom the federal court proceedings were had, as a witness. His testimony shows that the matter of the constitutional liability of the stockholders was argued, and to some extent considered; that it was his opinion that the corporation was not a banking institution, and that such view of the case was one of the considerations which moved him to overrule the motion and objections, and deny the plaintiffs herein the right to file their petitions and litigate that question. It is also shown by his evidence that the case had been pending in his court for many years; that he desired to have an immediate and final disposition of it, and therefore overruled the motion and objections, and discharged the receiver. From a fair consideration of all of the evidence it seems clear that the proceedings in that case do not constitute a bar to the prosecution of this action. The rule is well settled that the determination of a motion or a summary application is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the more regular form of an action.

Heidel v. Benedict, 61 Minn. 170, 31 L. R. A. 422; *Kanne v. Minneapolis & St. L. R. Co.*, 33 Minn. 419; *Simson v. Hart*, 14 Johns. (N. Y.) 63, 75; 1 Freeman, Judgments (4th ed.), secs. 325, 326; 2 Black, Judgments (2d ed.), sec. 689.

It is also contended that the plaintiffs herein had the right to intervene in the circuit court and present for determination in that action the question of the stockholders' liability, and that having failed to do so, they are estopped to present the matter in this proceeding. As was said in our former opinion:

"We are not prepared to carry the rule to the extent sought by counsel. The receiver appointed by the circuit court for the trust company was authorized and directed to collect and convert into money the assets of the corporation. He took the place of the regularly constituted officers of the corporation and had the same right to proceed against any of the stockholders that the officers of the corporation had. He could have proceeded against any of the stockholders for the collection of any balance remaining due from them to the corporation on subscriptions for stock, and could have collected any assessments legally made against the stockholders. In short, it was his duty, under the directions of the court, to convert all the assets of the corporation into such form as would enable them to be used for the satisfaction of the debts existing against the corporation. The liability of the stockholders created by the constitution was not one existing in favor of the corporation, but in favor of the creditors."

It is clear that this provision of the constitution does not increase the capital stock or the financial resources of the corporation. Its only object is to provide an additional fund for the security of its creditors. This double liability is placed upon the stockholders solely for the benefit of the company's creditors. The officers and agents of the corporation can not dispose of or control the fund thus created; they can not collect it by assessment upon the shareholders, nor can they assign it to a trustee for the

benefit of creditors, even though the corporation be insolvent. 3 Thompson, Private Corporations, sec. 3560; 1 Cook, Stock, Stockholders and Corporation Law (3d ed.), sec. 218. In *Runner v. Dwiggins*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645, the court said:

"Certainly it cannot be asserted with any reasonable support, that this peculiar liability imposed by the statute upon those who became shareholders of a banking association organized under the existing law, is in any sense an asset, right or interest of the bank which it, as an insolvent debtor, can by its deed of assignment pass to its assignee, or in any manner vest the enforcement thereof in him. In the absence of some statutory provision conferring the right, neither the corporation nor its assignee, nor receiver can enforce such a liability as that in question."

It has been held, however, that notwithstanding this liability was a subject over which the receiver ordinarily had no jurisdiction, that a proceeding to enforce this liability might very properly be instituted by a receiver appointed by the court for that special purpose. Or that the action may be maintained by one creditor for himself and on behalf of all others. Without doubt the receiver appointed by the circuit court for the trust company, after the debts against the corporation had been judicially ascertained, and its property exhausted, could have proceeded to enforce the stockholders' liability in question herein if he had been directed to do so by the court. But in that event it would have been necessary to remove the then acting receiver and appoint a disinterested person in his stead. This the court refused to do. And it is sufficient to say that the plaintiffs herein are not estopped to litigate the questions involved in this action by reason of the proceedings in the case in the federal court.

For the foregoing reasons, the judgment of the district court is right, and is therefore

AFFIRMED.

**ANN M. MARTIN, APPELLEE, v. C. C. ABBOTT ET AL., IM-
PLEADED WITH DON L. LOVE, INTERVENER, APPELLANT.**

FILED JUNE 9, 1904. No. 13,421.

1. **Purchaser Pending Suit.** One who purchases real estate from a defendant in an action brought to recover dower, after a decree of the district court in favor of such defendant and while the case is duly pending in this court on appeal, with actual notice of the plaintiff's claim of dower, takes his title subject to such claim.
2. ———: **APPEAL.** In such a case, where no supersedeas bond is provided for by statute and none is filed, the decree appealed from will not protect a purchaser who takes the title with actual notice of its condition and of the pendency of the appeal.
3. **Decision Modified.** *Parker v. Courtney*, 28 Neb. 605, is modified in so far as it seems to conflict with the opinion herein.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Ricketts & Ricketts, for appellant.

Strode & Strode, contra.

BARNES, J.

The appellee, Ann M. Martin, began an action in the district court for Lancaster county in 1896 to recover dower in certain real estate in said county. C. C. Abbott and Flora M. Abbott, his wife, who then were the owners of the land, were made defendants. Issues were made up and a trial had, and on the 1st day of April, 1897, the court rendered a judgment by which it was decreed that Mrs. Martin had no dower interest therein. She thereupon appealed to this court, where the judgment of the district court was reversed. After the cause had been remanded, and on the 7th day of February, 1902, the appellant, Don L. Love, filed a petition of intervention in the case alleging that he became the owner of the tract of land in which the plaintiff claimed a dower interest, by a conveyance from Abbott on the 18th day of September 1901. He

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further alleged that at the time of his purchase, the appeal was pending in the supreme court; that no supersedeas bond had been filed by Mrs. Martin pending the appeal, and that the decree of the district court quieting title in Abbott was therefore in full force and effect; that he was a *bona fide* purchaser, and that he relied upon the decree, and prayed that his title be quieted as against said dower interest. Mrs. Martin answered this petition in intervention alleging the facts as to the bringing of the suit in the district court, the decree therein, her appeal to the supreme court and the finding and decree thereof, and alleging further that the intervener and defendant are estopped by the judgment and decree of the supreme court from questioning her right to dower in the premises. The cause was tried in the district court upon the petition in intervention, and the answer, where the findings and decree were in favor of Mrs. Martin and against the intervener, Love, and he appealed.

It appears that appellant purchased quite a large tract of land from Abbott, the defendant in the suit, of which the land in controversy is but a small portion. It also appears from the evidence that at the time he purchased the premises, he was aware that the title to the land in question was in litigation, and that an appeal had been taken to the supreme court from the decree refusing Mrs. Martin dower therein. Love insists that the judgment of the district court quieting the title in Abbott, and declaring Mrs. Martin foreclosed of all right, title, interest, dower or claim in and to the property, was a final judgment upon which he had a right to rely; that no supersedeas bond having been executed by her, any subsequent proceedings in the supreme court by which the decree might be reversed, modified or vacated, could not interfere with the rights which he had obtained by reason of his purchase while the decree was in full force. On the other hand, Mrs. Martin takes the position that no supersedeas bond was required or provided for by the statute; that it was unnecessary for her to give such a bond, and that consequently a purchaser

from Abbott with actual notice of the pendency of her appeal, was in no better position than Abbott himself, and took the title subject to all the contingencies which might befall him as to the vacation, modification or reversal of the decree.

It appears that this is not a case where the appellant obtained title to the real estate in question at a judicial sale, or under any order, judgment or decree of a court. The facts are that he purchased the land from a litigant, a party to a pending suit, in which the title was the matter in controversy; and, although there had been a decree rendered in the district court in favor of his grantor, yet he had full knowledge of all of the facts, and actual notice that an appeal had been taken to the supreme court, and that the case was there pending and undetermined.

An appeal to this court in a suit in equity brings the case here for trial upon the merits *de novo*. If this be true, as soon as Mrs. Martin perfected her appeal the case was then pending in this court, and it thus appears that the appellant acquired his title during the pendency of the suit.

Actual notice that there is an action pending affecting the title to real estate is as effective as the filing of the statutory notice of *lis pendens*. *Sampson v. Ohleyer*, 22 Cal. 200; *Sharp v. Lumley*, 34 Cal. 611. The purpose of the *lis pendens* statute is to make the filing of a paper with the proper officer take the place of actual notice, and the provisions of the statute do not render actual notice any less effective. When Love bought the premises pending the appeal he took the same with his eyes open; he obtained the title clothed with no greater rights than his grantor, and took the same subject to the contingency of an adverse decision in this court. In *Clark v. Charles*, 55 Neb. 202, it was held, that "A purchaser of real estate, during the pendency of a suit for its partition, from a party to such suit, is as much bound by the disposition made of the real estate by the decree rendered in such an action as his grantor."

One "who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases." 2 Black, Judgments (2d ed.), sec. 550; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 565; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559.

The case of *Hollister v. Mann*, 40 Neb. 572, throws some light on this question. That was a case where the title to real estate had been obtained from a purchaser at a judicial sale, which sale was afterwards vacated and a resale ordered. We held therein that the purchaser having bought without notice of any proceedings to set aside the sale, was protected. But it is said in the opinion:

"If there had been pending a motion to set aside the sale and confirmation before the purchaser thereunder had parted with his title, a question very different from that under consideration would have been presented. In such a case there would have been pending a motion upon consideration of which it might reasonably be anticipated that the sale and confirmation would be set aside." In the case at bar, when Love bought he might have reasonably anticipated that the decree in favor of his grantor might be set aside by this court. By the appeal the action was still pending; he bought *pendente lite*, and his title was affected with all the imperfections of the title of his grantor.

We have not overlooked the case of *Parker v. Courtney*, 28 Neb. 605. In that case one of the litigants, in whose favor the district court had rendered a decree, sold the premises to a third party pending an appeal therefrom. Such third party sold and conveyed the premises to the appellant, Parker, who paid full value therefor, and took his title without any notice, actual or constructive, of the litigation in relation thereto, or the pendency of the appeal. It would seem, therefore, that the cases are fairly distinguishable. But inasmuch as they seem to be in conflict, the opinion in that case is modified to conform to the rule announced herein.

The statute makes no provision for a supersedeas bond

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in a case like the one at bar. And therefore we think the failure to file such a bond is no protection to one who purchases the property from a litigant with actual notice of the pendency of the suit in which the title thereto is in question. We are unwilling to sanction a rule which will permit a party to a pending action to convey the real estate which is the subject of the litigation to another, who takes it with full knowledge and actual notice of the pendency of the suit, and thus deprive the court of its power to administer justice between the parties.

For the foregoing reasons, the judgment of the district court is right, and is

AFFIRMED.

CASS COUNTY V. SARPY COUNTY.*

FILED JUNE 9, 1904. No. 12,183.

Counties: BRIDGE REPAIRS: ACTION: DEFENSE. When a county has refused, upon request, to participate with an adjoining county in repairing a bridge over a stream forming part of the boundary line between them, and the latter county has performed the work at its separate expense, it is not a defense to an action for contribution under the statute, that the plaintiff county, in procuring the repairs to be made, proceeded in an irregular or illegal manner with respect to obligating itself to pay for them, provided it did in fact become so obligated.

ERROR to the district court for Sarpy county: BENJAMIN S. BAKER, JUDGE. *Rehearing denied.*

Jesse L. Root, for plaintiff in error.

William R. Patrick and Wright & Stout, contra.

AMES, C.

This is an application for a third rehearing in this case, and is founded upon two assumptions: First, that the

* See former opinions, 63 Neb. 813; 66 Neb. 473, 476.

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last opinion herein misinterprets the opinion of this court in *Clark v. County of Lancaster*, 69 Neb. 717. Such, however, is not the understanding of the author of the latter document, who actively participated in the last disposition of this case and who gave it his very careful consideration. Counsel for Sarpy county overlook the fact that although it was held in the *Clark* case that the contract with Sheeley was void because of the absence of prescribed statutory conditions authorizing its execution on the part of the county, yet it was not only held that equity would not enjoin the further prosecution of the work under the uncompleted agreement or the prosecution by the contractor of his claim for compensation for the work and materials actually done and furnished in the premises, but this court went a step further and not only stated an account between the parties respecting the transaction, but as a result thereof rendered an affirmative judgment for nearly \$11,000 in favor of the contractor and against the county. It can be of no practical significance whether the claim thus upheld is denominated legal or equitable. In any view, it was held that the county was under an obligation for its payment which the court would and did enforce by its judgment, and the unavoidable inference is that if the suit in equity had not been begun and the contractor's suit at law had not been restrained but had been prosecuted to judgment for that amount, that judgment would not have been disturbed by the court because of the "illegality" of the claim upon which it would have been founded.

It is thus evident that the major premise of the opinion of November 5 last in this case is a legitimate interpretation of the opinion in the *Clark* case, and that Cass county was obligated to the contractor to pay the reasonable value of the repairs to the bridge in question. Whether such obligation was legal or equitable, we cannot think is a material question.

Secondly, it is argued that Cass county was authorized to make the repairs, if at all, merely as the agent of

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Sarpy county, and that its agency was special and its authority limited by the statute, and that having exceeded its authority by making the repairs in the absence of funds of its own applicable to that purpose, it failed to bind its principal by so doing. We had supposed that our former opinions, especially the last of them, had made it sufficiently plain that in our opinion the relation of principal and agent is not analogous to a case of this kind. The powers of Cass county, in the premises, are derived directly from the statute. It was authorized to perform a specified public work, in conjunction with Sarpy county, if the latter would consent to participate therein, but without such participation, if consent should be refused. Counsel was requested and refused, and this fact, as we endeavored to explain in our last opinion, set Cass county free to act in all respects as though the bridge had lain wholly within her own territory. Whether her fiscal affairs were such as to justify the expense, or whether her county board were exceeding their authority to obligate her own taxpayers were matters which her own citizens had alone the right to inquire into. The fact that Sarpy county could not be bound for contribution unless she had been requested to participate in the creation of the work, did not confer upon her authorities the right to supervise the internal affairs of Cass county, or to complain that the officials of the latter county were conducting their business in an irregular or illegal manner.

It is therefore recommended that the motion for a rehearing be overruled.

OLDHAM, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion for a rehearing be overruled.

REHEARING DENIED.

W. S. GILLMAN, APPELLANT, v. FRANK TOPINKA ET AL.,
APPELLEES.

FILED JUNE 9, 1904. No. 13,480.

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

R. C. Noleman and W. G. Simonson, for appellant.

AMES, C.

This is an action to foreclose a real estate mortgage, begun by the usual petition and due service of process. The mortgagors made default; but another defendant, who claimed some interest in the premises—the record does not disclose what—appeared and moved to dismiss the action, for the alleged reason that the subject matter of it had been previously adjudicated between parties other than those to this suit. No answer or other pleading was filed. The court sustained the motion and rendered a judgment of dismissal. The plaintiff appeals. There is no appearance for the appellee or appellees in this court.

It is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to render a decree as prayed in the petition, unless a defense shall be established by pleadings and proofs.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to render a decree as prayed in the petition, unless a defense shall be established by pleadings and proofs.

REVERSED.

JEROME B. PARROTT V. JOHN W. McDONALD ET AL.**FILED JUNE 9, 1904. No. 13,550.**

Sheriff: ACTION FOR DAMAGES. A plaintiff can not recover damages from a sheriff, on account of negligence by which an attempted levy of a writ was rendered ineffectual, if he has contributed to the result by his own negligence or by that of an attorney whom he has employed to supervise the procedure.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Lysle I. Abbott and Dan J. Riley, for plaintiff in error.

Byron G. Burbank, contra.

AMES, C.

George W. Ames, formerly a resident of Omaha, became insolvent, and finally left the state somewhat suddenly on a Saturday night. He was indebted to the plaintiff Parrott in a considerable sum of money and was the owner of a large number of city lots of small individual value. Parrott employed an attorney, and, in company with him and a deputy sheriff, spent the greater part of Sunday afternoon and evening in the preparation of papers for the beginning of an attachment suit, and in making copies of the writ to be posted on the lots at the time of the levy. In the course of the evening the deputy told Parrott that the law required that the levy should be made in the presence of two residents of the county and the latter procured promises of the attendance of two such persons living in the neighborhood. The writ was procured to be issued shortly after midnight, and the plaintiff and deputy started out in a carriage to go to the lots and make the levy. The attorney was also in the carriage, but did not intend to go, and did not go, the entire distance. One of the witnesses was expected to be found, and was found, at the site of some of the lots, the other resided on the

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side of the route of travel and was expected to be taken up on the way. At a proper place Parrott proposed to turn and drive along an intersecting street for this purpose, but the deputy told him it was unnecessary to do so and he desisted. Before arriving at the lots, the attorney left the carriage at his home, and did not rejoin the party that night. Levies were attempted to be made on all of the lots, and a copy of the writ was posted on each of them by the deputy in the presence of Parrott and one other person only. On the morning of the same day, which was the 6th of April, the party returned to the court house. Plaintiff did not go to the sheriff's office, but on the same day he saw his attorney and talked with him about the matter and the deputy made an appraisal of the lots, substituting another person in the place of the plaintiff as one of the appraisers, but at the suggestion of whom, if any one, is not known. The statute requires the appraisement to be made by persons witnessing the levy. The writ was not returned into court until the 18th, but it is impossible to infer that the plaintiff and his attorney were not at all times fully cognizant of all the circumstances and that the latter at least, and probably the former also, was fully aware of the irregularity, if not illegality of the procedure. On the 11th of the month, five days after the attempted levy, Ames incumbered the property for more than its value to third parties.

An order of the district court overruling a motion to dissolve the attachment because of the foregoing circumstances was reversed by this court and the lien of the attachment failed, or rather was held never to have existed. Ames was adjudged a bankrupt at his then residence in New York, the suit was dismissed and the claim of the plaintiff lost. This is a suit on the bond of the sheriff to recover damages on account of the negligence of his deputy. It is not alleged that there was any lack of good faith. The district court instructed a verdict for the defendant and the plaintiff prosecutes error. The defendant relies upon the foregoing facts, which are not in

dispute, and invokes the law of estoppel. But we are ignorant of any principle of estoppel applicable to the case and there is, apparently, some danger of that doctrine becoming debilitated from overwork.

There is no direct or positive evidence, nor anything from which it can be inferred, that the plaintiff said or did anything calculated to influence or which did influence the conduct of the deputy. If there were any malign influences at work between the two, they apparently operated in an opposite direction. But the action is for negligence, and it seems to us that the familiar rules of law relative to contributory negligence are not without pertinency. It is likely enough that the plaintiff, being "a layman," was justified in deferring to the supposed superior knowledge of the deputy, and in following the course which the latter chose to take with reference to the service of the process in his charge, but as much cannot be said for the attorney who was the agent of the plaintiff and who had general supervision of the proceedings in his behalf. He knew the course that was being adopted on the night of the levy, and knew or ought to have known on the following day what had been done in this regard and what was about to be done with reference to the appraisal and the return of the writ.

Five days intervened before the making of the voluntary incumbrances by Ames, during which the mistake might have been corrected and during which there was abundant opportunity for consultation between attorney and client, and enough had occurred to excite the vigilance of the plaintiff to take counsel concerning the contradictory advice of the deputy. As a matter of fact the question of law involved was not free from doubt, as is evidenced by the ruling of the learned district judge upon the motion to discharge the attachment, and the elaborate opinion by which it was found necessary to dispose of the inquiry in this court. On the whole, we conclude that the plaintiff and his attorney contributed at least equally with the deputy to the mistake by which the attempted

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levy was rendered ineffectual, and to the omission to procure a new levy before the lots were placed beyond reach, and we recommend therefore that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

AMERICAN RADIATOR COMPANY V. THE AMERICAN BONDING & TRUST COMPANY.

N. O. NELSON MANUFACTURING COMPANY V. THE AMERICAN BONDING & TRUST COMPANY.

FILED JUNE 9, 1904. Nos. 13,522, 13,523.

1. **Contractor's Bond: CONSTRUCTION.** A bond given by a contractor for the erection of a public building in this state, conditioned for the payment of laborers and material men, derives no obligatory force from the statute as respects the latter subject, and, as to it, is to be treated, at most, as a common law obligation.
2. ———: **VALIDITY.** An instrument, which by recitals upon its face purports to be the joint obligation of one as principal and another as surety and to require execution by both, and which the former, in violation of the instructions and without the knowledge or subsequent ratification of the latter, delivers to the obligee without having signed it, is void.

ERROR to the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

S. L. Geisthardt and Mockett & Polk, for plaintiffs in error.

Strode & Strode, contra.

AMES, C.

These two cases being identical in all essential respects were consolidated for the purposes of briefs and argu-

ments, and were submitted together and will be decided by a single opinion.

In October, 1899, the board of public lands and buildings entered into a written contract with one C. F. Barras, by which the latter undertook the construction of a building for state purposes. The contract contained the following covenant:

"And the said first parties agree to give to the state of Nebraska a good and sufficient bond in the sum of \$10,000, executed by an approved surety company, conditioned for the faithful performance of this contract, and also conditioned for the payment of all labor and material used in the erection of said building."

A statute in force at the time required the board in such cases to take from the contractor a bond conditioned "for the payment of all laborers and mechanics, for labor that shall be performed" pursuant to the contract, but made no provision concerning the material to be furnished thereunder, nor reference to any persons other than those above mentioned. Barras made a written application to the defendant in error, also defendant below, to execute a bond as required by the contract, and undertaking to indemnify it for loss or damages, if any, occasioned by so doing. The defendant, for a consideration, complied with the request, the instrument purporting by recitals upon its face to be the joint obligation of Barras as principal and the defendant as surety. The defendant, after executing it, delivered it to Barras with instructions to sign it and tender it to the board. He delivered it to the board without his signature, and the latter accepted and approved of it in that condition. Barras performed his contract, and, in the accomplishment of that end, sublet the heating and plumbing apparatus requisite therefor to one H. H. Gaffey. Gaffey performed his sub-contract and purchased the material used in so doing from the plaintiffs in error. The board accepted the building and settled with and satisfied Barras, and the latter did the like with Gaffey, but Gaffey has not paid the plaintiffs in

error or either of them. This suit is upon the bond to recover for the heating and plumbing materials above mentioned. Judgments of the district court for the defendants are sought to be reversed by these proceedings. That court found, in substance, correctly, as we think, that there is no evidence that the plaintiffs sold the material to Gaffey with especial intent or view to its use in the building in question, but that presumably the sales were made solely upon faith in and reliance upon his individual credit and responsibility, and that, at the times of the final payments by the board to Barras and by the latter to Gaffey, neither that body nor Barras had been notified or had any knowledge that there was any sum due or unpaid for the materials or any of them on account of which the actions were brought. The relevancy and materiality of these findings, as well as of the fact that the defendant was in like ignorance, are disputed, and may be doubted, except in so far as they have a bearing upon the question whether the materials were furnished with a view and purpose that they should be used in the construction of this building. And this question is itself unimportant, unless it shall be determined that the mechanics' lien law governs or in some way affects the rights of the parties. But in that case, the question having been answered in the negative, the point is not advantageous to the plaintiffs. We are, however, unable to see that the mechanics' lien law is applicable in any way to this transaction, and we will not pursue the subject further. Beyond this, these findings may be regarded as evidence of laches, but whether they are enough such to defeat an otherwise sufficient cause of action need not be decided.

If the instrument in suit is not invalid for lack of due execution, it derives no obligatory force from the statute in so far as it makes reference to material to be used in the erection of the building. *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319; *Huck & Co. v. Gaylord*, 50 Tex. 578; *McCluskey v. Cromwell*, 11 N. Y. 593; *Kieldsen v. Wilson*, 77 Mich. 45, 43 N. W. 1054.

So far as this subject matter is concerned, the bond can, we think, be regarded as no more than a common law obligation. The instrument named Barras, the contractor, as principal, and is conditioned "that if said principal shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on his part to be kept and performed according to its tenor, and shall pay for all labor and material used, then this obligation is to be null and void." It cannot be successfully disputed that Barras fulfilled this condition literally. It is disputed whether Barras's sub-contract with Gaffey was not in violation of his contract with the state, and if it was not therefore itself void and a forfeiture of the latter. But we cannot understand how that is a matter which concerns the plaintiffs in these actions. The state, at any rate, did not see fit to enforce a forfeiture, and Barras, by the means mentioned, became the owner of the materials used in constructing the building and paid for them in good faith and without knowledge or notice that the person from whom he acquired them had not done likewise; and this was all that the bond or his contract required of him.

The foregoing conclusion suffices to dispose of the case, but another question was strenuously litigated and ought, perhaps, to be decided. The bond was entrusted by the defendant to Barras as its agent, with instructions to affix to it his own signature and deliver it to the board and not to deliver it otherwise. He was an agent therefore for a special purpose and with limited authority. The limitation was expressed in the plainest and most unequivocal terms on the face of the instrument itself, which recites its execution by himself as principal and by the defendant as surety for him only. The obligee is conclusively presumed to have read the instrument and to have known that the delivery by Barras was in excess of his powers as agent. It does not appear that the defendant was ever made aware of that fact until the beginning of these actions. According to a long settled rule of this court the instrument, therefore, never became a contract

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by the defendant. *United States Fidelity & Guaranty Co. v. Ridgley*, 70 Neb. 622, and cases there cited. See also *Cutler v. Roberts*, 7 Neb. 4; *Mullen v. Morris*, 43 Neb. 596; *Middleboro Nat. Bank v. Richards*, 55 Neb. 682, and the same rule applies to a statutory bond. *Bollman v. Pasewalk*, 22 Neb. 761; *Gray v. School District*, 35 Neb. 438.

It is contended that the reason for this rule fails in the case at bar because the principal had given the surety a separate contract of indemnity, but the argument is, we think, not good. The indemnity was for the giving of a bond upon which Barras should be bound as principal. Such a bond was never given. It is a matter of indifference whether the surety's reasons for requiring the principal to be bound upon the instrument were good or bad, or were for his advantage or not. It had a right to prescribe such conditions as it saw fit, and to become bound, if at all, only in such manner as it chose. The condition, however, was for its advantage. Had Barras signed the instrument, the defendant would have been entitled to have him made a party to any suit upon it, and, in case of recovery in such suit, to have his property first exhausted for the satisfaction of the judgment, and in case of payment by itself, to have the right of exoneration determined and the amount thereof ascertained without the expense, delay and uncertainty of a suit upon another contract. Note in 90 Am. St. Rep. (*Estate of Ramsay v. People*) at page 193.

For both the foregoing reasons, therefore, it is recommended that the judgments of the district court be affirmed.

LETTON and OLDDHAM, C C., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgments of the district court be

AFFIRMED.

JOHN F. NEAL ET AL. V. WILLIAM VANSICKLE ET AL.

FILED JUNE 9, 1904. No. 13,592.

1. Drainage: CONSTITUTIONAL LAW. The drainage and reclamation of large tracts of swamp and overflowed or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations.
2. Assessments upon private property to defray the cost of local improvements are void if in excess of the benefits conferred, or if levied without notice to persons upon whose property they are imposed, or affording them an opportunity to be heard.

ERROR to the district court for Nemaha county: JOHN S. STULL, JUDGE. *Reversed.*

Neal & Quackenbush, for plaintiffs in error.

Edgar Ferneau, *contra.*

AMES, C.

In 1903 the legislature passed an act, chapter 116 of the laws, sections 1-19, article IV, chapter 89 of the Compiled Statutes (Annotated Statutes, 5561-5579), the purpose of which is expressed in its title as follows:

"An act to provide for the formation of drainage districts; for the reclamation and protection of swamp, overflowed, or submerged lands; to provide for the acquirement of rights of way, easements and franchises, or other property necessary to carry out the purposes of this act; to prescribe the course of procedure to be followed to accomplish such object; and to prescribe a penalty for the wilful and malicious injury or interference with the rights or property of said districts."

Pursuant to this act, thirteen persons owning contiguous tracts of land in Nemaha and Otoe counties, aggregating nearly 4,000 acres, joined in the execution of articles of association for the creation of a drainage dis-

tract including said lands and also a large number of other tracts in said counties, the owners of which refused to join in such association. The articles thus adopted were filed as the act prescribes and presented to the district court for Nemaha county together with a prayer for an order or judgment establishing the association as a public corporation of the state in conformity to said act. It is not disputed that the entire procedure, including service of process upon the nonconsenting landowners, was in all respects such as is prescribed by sections 1 and 2 of the act for obtaining the judgment prayed for. Various objections were made by the persons refusing consent, but all united in one contention, namely, that the act mentioned is unconstitutional and void, and solely in consideration thereof the court dismissed the application. The moving parties bring the proceeding to this court by petition in error.

The record thus presents primarily and directly but two questions, namely, whether the drainage of large tracts, swamp and overflowed or submerged lands, is a subject of such public and general interest that the legislature may provide for it by general enactment, and, if so, whether such provision may include the creation of local political organizations to serve as agencies for the accomplishment of the desired end. If these questions are answered in the affirmative, it must, we think, be conceded that the method of creation or organization is a matter purely and exclusively of legislative discretion with which the courts have no power to intermeddle. It will not be contended that the courts have the right to dictate how road districts or school districts or townships or counties shall be created or organized, nor with what administrative powers or functions they shall be endowed, and, obviously, what is true of them in this respect is true of any other similar governmental agency that the legislature may see fit to call into being. The creation of such bodies is an act of sovereignty and the consent of the inhabitants, unless expressly re-

quired by constitutional enactment, has never been thought to be requisite. That the districts contemplated by the act are intended to be of a purely public and administrative character, is evident as well from the title as from the body of the law itself. Its officers are chosen by popular election and their powers, duties, compensation and terms of service are prescribed by the statute. The sources of its income are predetermined as are also the uses to which it may be applied, and the county treasurer is made the custodian of its funds, and his disbursement of them regulated as in case of other public moneys.

In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of watercourses, the building of levees and the drainage of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions. Authorities to this effect are numerous, and of the highest character, and are so easily accessible that their recapitulation here would serve no useful purpose. They may be found collected in the opinion of the supreme court of Missouri in *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 60 L. R. A. 190, and in an elaborate marginal note. We know of no recent authority to the contrary. The decision of this court in *Jenal v. Green Island Draining Co.*, 12 Neb. 163, much relied upon by defendants in error, is not in conflict herewith. In that case, the body seeking to exercise the powers of eminent domain and of assessment and taxation, was a private corporation having officers and functionaries of its own choosing, governed by rules and regulations of its own devising, and enjoying the free disposition of its income. Such an organization is as unlike that now under discussion as can well be conceived of.

The foregoing conclusion, if sound, suffices for the disposition of the present proceeding, because nothing is here involved but the question of the validity of an organization created in the manner prescribed by the act of 1903, and the decision of that question does not preclude a future inquiry into the validity of the powers conferred, or sought to be conferred upon it, or the legality of the methods prescribed or that shall be adopted for their exercise. A municipal corporation would not cease to exist because its charter attempted to confer upon it powers of assessment or taxation, or of eminent domain or of police regulation in violation of the constitution, but its defects and insufficiencies in these respects would be supplied and remedied by subsequent legislation, and the same would be true, under like circumstances, of a drainage district. But, inasmuch as objection is made to the 12th and 14th sections of the act, and inasmuch as these sections prescribe the sole means by which the organization may obtain funds for the prosecution of its purposes, so that, if they were void, it would remain inanimate until vitalized by new legislation, it is important that they receive present consideration. Of these sections the following are copies:

"Sec. 12. As soon as said drainage district shall have been organized as aforesaid, and in order to defray the expenses for said topographical survey, the condemnation of any right of way, easement or franchise and constructing any ditch, drain, dyke or other works, maintain the same, and to pay such officers, servants and employees as are allowed compensation by law, the said board of supervisors may order the assessment of a tax, not exceeding fifty cents on each acre of land situate in said district to be benefited, Provided, that in apportioning the tax or assessment to be borne by each separate tract of land, due regard shall be had to the amount of benefit expected to accrue, proportionately, to such separate tract and shall be determined in the first instance by the drain commissioner and shall be equalized and approved by

the board of supervisors and not excluded by court, for each and every year, and until no further expenditure of money in that behalf shall be necessary; and whenever the said board of supervisors shall have, by resolution, ordered the assessment of a tax, the secretary of the board, under the seal of the district, shall cause a certified copy of said order describing each piece or parcel of land, right of way, road or property so benefited to be transmitted to the clerk of the county in which said drainage district shall be situated, and in case said drainage district shall be situated in two or more counties, then to the clerk of each county in which any portion of said district may be situate; and the said tax shall be extended on the tax book of the county on the real estate to be benefited, situated in said district, in the same manner that other taxes are now extended, in a column under the heading of 'drainage tax,' and shall be collected by the treasurer of the county in which the real estate is situated on which the tax is levied."

"Sec. 14. The board of supervisors of any such district may, with the consent of the owners of not less than two-thirds of the whole number of acres in said district, given at an election held for that purpose at a time and place in said district to be fixed by such board, and upon notice for the same length of time and under an organization of the meeting the same as provided in case of the election of supervisors, borrow and issue bonds therefor upon the credit of said district, any sum not exceeding six dollars per acre upon all lands in said district, to be used in paying for right of way and in constructing the drainage works authorized in this act; such bonds shall bear not exceeding six per cent. per annum, and shall not be sold for less than par. Upon negotiating any such loan, it shall be the duty of the board of supervisors to assess upon said district not exceeding fifty cents per acre in any one year, for the purpose of producing a sinking fund with which to pay the interest and principal of said bonds as it matures; and no such bonds shall be made to run for more than twenty years."

Objection is made to section 12, because it does not prescribe notice to the landowners of the making of the assessment or of the time and place of its equalization by the board of supervisors. We think that the weight of reason and authority is that an assessment on account of local improvements which is required to be levied in proportion to benefits, is void if the property owner is not notified or afforded an opportunity to be heard. *Stuart v. Palmer*, 74 N. Y. 183; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; 2 Cooley, Taxation (2d ed.), 653-655.

But it does not follow that the section in question is void. The board by whom the assessment is to be equalized and levied, is an elective deliberative body, to which is committed general supervision of the affairs of the district. It necessarily has implied power to prescribe rules and regulations for its own conduct and the transaction of business in its charge, in conformity to whatever rules and principles of law are applicable thereto, including provisions for notice of the time and place of their sittings as a board of equalization and the manner in which interested persons shall be afforded an opportunity to be heard. The fact that the assessment is to be made in anticipation of benefits to be derived from a definitely described public work, thereafter to be constructed, is not in our opinion fatal, although the legislative wisdom of such a policy may be doubted.

There is more serious objection to section 14. It must be regarded as the settled law of this state that assessments to defray the cost of local improvements must not exceed the value of the benefits conferred upon the property affected. *Hanscom v. City of Omaha*, 11 Neb. 37; *Smith v. City of Omaha*, 49 Neb. 883; *Cain v. City of Omaha*, 42 Neb. 120.

The district has no power of general taxation and no means of acquiring revenues except from assessments of this character. This section purports to empower it to incur a debt equal to six dollars upon every acre of land

within its limits. It may well happen that none of the land will be benefited to exceed that sum or even by so much, and that the greater part or all of it may be benefited very much less. In order to meet its obligations in such a case it would be indispensable that some or all of the land should be taxed in excess of the limitation prescribed in the foregoing decisions. In view of this fact, the section evidently contemplates what counsel calls a "level assessment" of fifty cents an acre annually on all the lands in the district, without apportionment with respect to benefits, for the purpose of paying the principal and interest of the proposed bonds. Both such obligations and such a tax would be in excess of the powers which the legislature may constitutionally grant to the district and would be void, and we are of the opinion, therefore, that this section of the statute is also void. Besides this, the scheme proposed is an indirect method of farming out or selling the public revenues in anticipation of their collection, a practice that has been productive of intolerable evils whenever and wherever adopted. But section 14 is not an indispensable or essential feature of the act, and it may be stricken out without defeating its principal objects or seriously impairing the efficiency of the organization. Its elimination will, at most, delay somewhat the active prosecution of the intended improvements and the legislature may be applied to for additional powers if they shall be thought to be needed.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and OLDHAM, CO., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

Aachen & Munich Fire Ins. Co. v. City of Omaha.

AACHEN & MUNICH FIRE INSURANCE COMPANY ET AL. V.
CITY OF OMAHA ET AL.

FILED JUNE 9, 1904. No. 13,616.

ORIGINAL action to cancel municipal taxes. *Dismissed.*

Greene, Breckenridge & Kinsler. for plaintiffs.

C. C. Wright, contra.

. AMES, C.

This is an original action in this court; the object and prayer of the petition in which is to procure a judgment of this court canceling and annulling certain alleged levies of taxes by the mayor and council of the city of Omaha against or upon certain insurance companies doing business in that city, on the ground that the assessments upon which the levy was made are void. In our opinion, the subject matter is not within the jurisdiction of this court. By section 2, article VI of the constitution, this court is given original jurisdiction of only "cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus," etc. Evidently the word revenue as here used has no reference to the revenues of municipal corporations, but to those only which are required for the purposes of general state administration.

We recommend, therefore, that the action be dismissed at the costs of the plaintiffs.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the action be dismissed at the costs of the plaintiffs.

DISMISSED.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY V. CITY OF
OMAHA ET AL.

FILED JUNE 9, 1904. No. 13,615.

ORIGINAL action to cancel municipal taxes. *Dismissed.*

*John J. Sullivan, Montgomery & Hall and Greene,
Breckenridge & Kinsler, for plaintiff.*

C. C. Wright, contra.

AMES, C.

This case differs from that of *Aachen & Munich Fire Ins. Co. v. City of Omaha, ante*, p. 112, only in the circumstance that the plaintiff is a life insurance company instead of a fire insurance company. It is unnecessary to repeat our reasons for recommending that the action be dismissed at the costs of the plaintiff.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the action be dismissed at the costs of the plaintiff.

DISMISSED.

CHICAGO, BURLINGTON and QUINCY RAILROAD COMPANY
v. LEWIS RUSSELL.

FILED JUNE 9, 1904. No. 13,520.

1. **Infants: NEGLIGENCE: QUESTION FOR JURY.** No arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railroad tracks. Ordinarily, such question is one of fact for the jury.
2. **Injury: EVIDENCE.** Where a freight train is stopped across a village street and sidewalk near the depot for the period of 20 or 30 minutes, and there is an opening of 2 feet between the hind car of the freight train and a stationary car on the side track, about 15 feet from the sidewalk, in an action for injuries sustained while passing through this opening, it is proper to show that plaintiff saw others crossing through this opening ahead of him, and that it was the custom of the railroad company, for a long time prior thereto, to make openings of a similar character through freight trains similarly situated, for the purpose of showing a license or invitation of the railroad company to the public to pass through this opening.
3. **Negligence: QUESTION FOR JURY.** Where the hind car of a freight train projects over and across a public crossing, and remains in this condition for a period of 20 or 30 minutes, and a large number of people are at the depot, and, necessarily, pass around the rear end of the car in going to and from the depot, it is for the jury to determine whether it is actionable negligence for the railroad company to start its train with a backward motion, without giving a special warning before doing so.
4. **Evidence examined, and held sufficient to sustain the judgment of the trial court.**

ERROR to the district court for Richardson county:
JOHN S. STULL, JUDGE. *Affirmed.*

Francis Martin, O. J. Weaver, J. W. Deweese and Frank E. Bishop, for plaintiff in error.

E. Falloon, John Gagnon and C. Gillespie, contra.

OLDHAM, C.

Rulo, Richardson county, Nebraska, is a town of about 900 inhabitants, situated on the banks of the Missouri river, and traversed from east to west by the main line of the Chicago, Burlington & Quincy Railroad Company. The greater number of the inhabitants reside south of the tracks of such company. There are three side tracks and the main line track of this company on the north side and one side track called the "house track" on the south side of the depot. Third street runs north and south from the southern boundary of the town to the depot, and is one of the mainly traveled streets of the village. There is a sidewalk on the west side of this street leading immediately to the depot platform, and east of this sidewalk is the traveled street. At the time of the occurrence of the injury on which this cause of action is founded, there was a freight train consisting of an engine and ten or twelve cars in the yards at the station between 4 and 5 o'clock in the evening. This freight train, which was switching in the yards, left its caboose upon one of the tracks north of the depot and backed in on the south or "house track" for the purpose of allowing two passenger trains, each going east, to proceed on the main track. When the freight train backed in on the "house track," its hindmost car extended over and beyond the sidewalk on the west side of the street leading to the depot for a space of about fifteen feet, and the train then consisting of an engine and ten cars all coupled together completely blocked the passage both on the street and the sidewalk leading to the depot. About two feet west of the hindmost car of the freight train was a string of seven or eight cars which had been previously backed in on this "house track" to an elevator west of the sidewalk, so that when the train stood in the position it occupied at the time of the injury, there was a space of about two feet between the rear car of the freight train and the foremost car in the string of cars remaining stationary on the track. The freight train re-

mained in this position for some twenty or thirty minutes during the time the passenger trains were arriving and departing over the main line track on the north side of the depot.

Plaintiff, a boy twelve years of age, who brings this action by his next friend, came up the sidewalk on Third street from the south to go to the depot and from there to his home in the northwest portion of the village; and when he found the passage blocked on the sidewalk by the freight cars, according to the testimony offered on his behalf, he turned and went around the rear car attached to the freight train, and attempted to pass through the space between this car and the stationary car west of it, and while doing so, the freight train, in preparing to move forward to open the way, first slackened back, as one of the witnesses described it, for the purpose of loosening the brakes, and when it had done so, it caught the hand of plaintiff between the drawhead on the hindmost car of the freight train and the drawhead of the stationary car standing on the track, and inflicted a severe injury to plaintiff.

The material allegations of negligence relied upon by plaintiff in his petition are as follows:

"That plaintiff further alleges that on the 19th day of December, 1898, the said railroad company, through its agents and employees, had a freight train which stopped at said station on a side track for the purpose of allowing another train to pass. That the defendant railway company at that time, negligently, wrongfully and unlawfully obstructed the usual public travel on Third street across said line at said station for about thirty or forty minutes with its freight train of cars. That persons going to and from said station on Third street objected to the unlawful closing of Third street, upon which objection, the defendant railway company disconnected and separated two of the cars of said freight train about two feet apart at or near the sidewalk of said street leading to said station, for the purpose of allowing the foot travelers to cross the

railway track of the defendant. Between the opening of said train, the travel, on invitation of defendant, was resumed at or near said sidewalk between the cars. That during the time said two cars of said train were disconnected and separated and the travel was resumed on said sidetrack through the opening thus made, this minor plaintiff, a child of immature years, on said date and without fault on his part, started from the south side of said train on said line of travel to go home through said opening in said freight train, and while attempting to do so, the defendant railway company by its agents and employees, without warning, negligently and wrongfully and without stationing a guard at said opening to warn the public passing through the opening of said train of cars when the opening in the cars would be closed, negligently, wickedly and violently, by means of the engine attached to said train, closed the opening in said train of cars, catching the plaintiff between the drawheads of said detached portion of the train, severing the second finger of the right hand and violently throwing plaintiff to the ground."

Defendant's answer was, in substance, a general denial and a plea of contributory negligence. On the issues thus joined, there was a trial to a jury in the court below, a verdict for plaintiff for one thousand dollars, judgment on the verdict, and defendant railroad company brings error to this court.

When the case was submitted to the jury, special findings of fact were returned at defendant's request. These findings, we think, are all fully supported by the testimony, and are as follows:

"1. Did the freight cars stand over and across the sidewalk and wagon road when Lewis (plaintiff) came to them from the south? Answer, Yes.

"2. Were the cars continuous and connected to each other from the sidewalk east to the engine? Answer, Yes.

"3. Was there any open space left between the cars within the limits of the sidewalk? Answer, No.

"4. Was there any open space between the cars west of the sidewalk? Answer, Yes.

"5. If there was an open space between the cars west of the sidewalk, was it caused by space accidentally left between the cars backed in and other cars standing on the house track? Answer, Yes.

"6. If there was an open space, how far was it west of the sidewalk, and how wide was such space? Answer, 15 feet west from sidewalk. Opening two feet.

"7. Was Russell (plaintiff) hurt while trying to cross the track through such open space, or by attempting to cross under the train? Answer, Open space.

"8. Was Lewis Russell (plaintiff) negligent in attempting to cross the track while the cars were in his way? Answer, No."

There is no complaint concerning the sufficiency of the testimony to support any of these findings except the last. With reference to this finding it is urged that, under all the testimony touching on the occurrence of the injury, plaintiff was clearly guilty of contributory negligence in attempting to pass between these two cars. With this contention, however, we cannot agree. While, as we shall presently point out, there was much material evidence offered by plaintiff wrongfully excluded by the trial court, yet, under the evidence admitted, we think the question of plaintiff's negligence was properly one of fact for the jury. The evidence admitted tended to show, that there was an extraordinary crowd at the depot on the evening that the accident took place, because it was expected that the body of a soldier who had died in the Philippines would be returned to that place on one of the evening trains for burial, and on that account a large number of people congregated at the station. It was also in evidence that one other person had passed through the opening in which plaintiff was injured five or ten minutes before him, and it was undisputed that the crossing and street were blocked by the freight train for from twenty to thirty minutes before the injury was inflicted. Under this state of the

testimony, and in view of the fact that plaintiff was a boy of only twelve years of age and should not be charged with that high degree of caution which would be expected of an adult in guarding against possible accidents at a railroad crossing, we think that the special finding of the jury on this question was supported by sufficient evidence. The authorities are uniform on the proposition, that no arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railroad tracks. *Burger v. Missouri P. R. Co.*, 112 Mo. 238, 20 S. W. 439; *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912; *Eswin v. St. Louis, I. M. & S. R. Co.*, 96 Mo. 290; *Plumley v. Birge*, 124 Mass. 57; *Meibus v. Dodge*, 38 Wis. 300; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 33 N. W. 306.

But now conceding, as we do, that each of these special findings of fact are supported by competent evidence, was there and is there sufficient evidence in the record to sustain the allegation of plaintiff's petition as to defendant's negligence occasioning the injury? Conceding as we must, that defendant was negligent in obstructing the sidewalk and crossing for the length of time which it did, there is another essential link in the chain of causality between this negligent act in obstructing the sidewalk and crossing and a legal liability for the injury inflicted; and this link is the duty, if any, defendant owed plaintiff and the public to give them a special warning before the train was started with a backward motion. There is no dispute as to the bell having been rung or the whistle blown before the train started; this warning, however, would not be sufficient notice to avoid liability for backing over a public crossing or closing an opening left near a public crossing through which the public had been invited by the action of defendant to pass. *Burger v. Missouri P. R. Co.*, *supra*; *Barkley v. Missouri P. R. Co.*, 96 Mo. 367, 9 S. W. 763; *Philadelphia, B. & W. R. Co. v. Laver*, 112 Pa. St. 414, 3 Atl. 874.

But the difficulty here arises in determining whether the evidence admitted by the lower court, in the case at bar, is sufficient to show that the defendant owed the duty of a special warning to plaintiff or anyone else passing through the opening above referred to. When plaintiff testified in answer to a question of his counsel that he had seen others pass through this opening, his answer, on motion of counsel for defendant, was stricken out; plaintiff's counsel then offered to prove by plaintiff that he had seen others passing through this opening, and that for a long time it had been the custom of defendant to make an opening between its freight cars on this particular track, for the purpose of allowing the public to pass through to the depot when the freight train was on the "house track." This offer was denied, as were similar offers from other witnesses, so that the only evidence admitted touching on this question was that of plaintiff, that he himself attempted to pass through this opening when he was caught and injured, and by one other witness, who said that he had passed through the opening safely some eight or ten minutes before the injury occurred.

It is in evidence, and found to be true by the jury in their answer to the fifth special finding, that this opening was left accidentally and not intentionally by the railroad company, so that, to charge defendant with the duty of giving a special warning to the public at this place before starting the train, even with a backward motion, we think it was necessary that proof should have been admitted tending to show an invitation to travel at and through the opening sufficient to charge the defendant's agents with knowledge of such fact. That evidence of this nature is material in cases of this character, is established by an unbroken line of authorities, some of which have already been cited herein on other questions involved in this controversy, and in addition to these may be cited, *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424, 49 Pac. 599; *Thurber v. Harlan B., M. & F. R. Co.*, 60 N. Y. 326.

The question then arises as to whether, notwithstanding the erroneous rulings of the district court on testimony offered by plaintiff, there is still sufficient evidence in the record to show that the railroad company should have given a special warning to passersby at the rear end of its train before starting with a backward motion. It is in evidence that there was a large crowd at the depot just before the accident occurred, and that most of the travel to the depot was over the sidewalk, which was obstructed by the train of cars. It is undisputed that one car stood over the sidewalk for about 20 or 30 minutes before the accident occurred. It is also in evidence that the mail carrier notified the conductor of the freight train, who was standing on the platform of the depot, to move the train from the crossing, so that the mail wagon could pass. It was testified by the defendant's witness Jackson, that he saw people passing through the opening between the cars before the plaintiff's injury; that defendant's brakeman, Dentner, while passing along the line of freight cars a few minutes before the injury, saw the opening between the cars.

After considerable hesitation we have concluded, from this testimony, that there is sufficient evidence in the record to charge plaintiff with the duty of giving a special warning at the rear end of its train before putting it in motion with a backward movement. It seems to us, in view of the special finding of the jury, that the case stands, so far as the liability of the defendant is concerned, as though there had been no cars on the sidetrack and defendant had merely backed one of its cars over the crossing for a distance of 15 feet and permitted it to remain there for 20 or 30 minutes when a large number of people were congregating at the depot, and necessarily passing backward and forward around the cars; and this, too, when the agents in charge of the train were in a position where they should and must have known of these surroundings. It seems clear, under the authorities heretofore cited, that defendant did owe a duty both to plaintiff and to the

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public to give a warning before starting its train with a backward motion under such conditions.

We therefore conclude that the evidence is sufficient to sustain the judgment, and, finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**FARMERS & MERCHANTS INSURANCE COMPANY V. THOMAS
E. MICKEL.**

FILED JUNE 9, 1904. No. 13,541.

1. **Insurance: INSURABLE INTEREST.** If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest. Following *German Ins. Co. v. Hyman*, 34 Neb. 704.
2. **Forfeiture: WAIVER.** When an insurance company issues its policy, and accepts and retains the premium, without requiring an application by the insured, and without making inquiry as to the condition of the property or the state of its title, and the insured has, in fact, an insurable interest, the company will be conclusively presumed to have insured such interest, and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. Following *German Insurance & Savings Institution v. Kline*, 44 Neb. 395.

**ERROR to the district court for Douglas county: JACOB
FAWCETT, JUDGE. Affirmed.**

*Henry W. Pennock and Halleck F. Rose, for plaintiff
in error.*

O'Neill & Gilbert, contra.

OLDHAM, C.

This is a suit on a policy of insurance. There is no disputed question of fact underlying the controversy. The plaintiff in the court below procured the policy of insurance from defendant's agent on his dwelling house and its contents. During the existence of the policy the house and contents were destroyed by fire. After proper notice of the fire to the defendant company, the loss of the household and kitchen furniture was adjusted and paid by the company, but all liability for loss on the building was denied, because the building was situated on leased premises. The insurance policy contained, among others, the following stipulation:

"If the interest of the insured in the property be any other than the entire unconditional and sole ownership of the property for the use and benefit of the insured, or, if the building stands on leased ground or ground not actually owned by insured in fee simple, it must be so expressed in the written portion of the policy; otherwise the policy shall be void."

The policy was issued on the oral application of plaintiff's brother, who was acting for him, and no representation of any kind was made touching the nature of the plaintiff's title to the land on which the building was situated. The undisputed evidence showed that the house destroyed by fire was worth considerably more than the amount for which it was insured. There was no claim of fraud or misrepresentation in procuring the insurance, the defendant company relying solely on the above stipulation as a warranty, which was broken on the delivery of the policy. On issues thus joined, there was a trial to

the court, without the intervention of a jury; judgment for plaintiff, and defendant brings error to this court.

The first question urged for our consideration, in a very able brief filed by the insurance company, is as to whether the plaintiff in the court below was possessed of an insurable interest in the house, situated, as it was conceded to have been, upon leased ground. It was alleged in defendant's answer, and admitted by plaintiff, that the house was built upon a substantial brick or stone foundation, that it had a cellar excavated beneath it, was attached to, and under ordinary circumstances would have passed with the realty. But conceding, for the sake of the argument, that the contention is true to this extent, it does not follow that the plaintiff had no insurable interest in the building, even if he could have been restrained from removing it in a suit by the owner of the fee, for as was said by this court in *German Ins. Co. v. Hyman*, 34 Neb 704:

"If the holder of an interest in property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest."

It being clearly apparent that plaintiff in the court below was the holder of an insurable interest in the dwelling house, we proceed to the consideration of the next contention of the insurance company, which is that the stipulation in the policy is a warranty which was broken on the delivery of the policy. The company frankly admits that to reach this conclusion we will be under the necessity of overruling our former adjudications in *Slobodisky v. Phenix Ins. Co.*, 53 Neb. 816; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811; *Hanover Ins. Co. v. Bohn*, 48 Neb. 743, and *German Insurance & Savings Institution v. Kline*, 44 Neb. 395, because, as alleged in the brief, "they are at war with fundamental principles and should be overruled." The

doctrine which has long received the approval of this court, and which was followed by the learned trial judge in the determination of the instant case in the court below, was well stated by IRVINE, C., who spoke for the court in *German Insurance & Savings Institution v. Kline*, *supra*, when he said:

"When an insurance company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making any inquiry as to the condition of the property or the state of the title, and the insured has in fact an insurable interest, the company will be conclusively presumed to have insured such interest and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. The real contract of insurance is made before the policy is written, and the insured, by accepting the policy with such a condition as the one relied upon, cannot be deemed to have represented his title to be in fee simple, or not by leasehold."

While it is true that the principle underlying this doctrine has been questioned by some eminent text writers and a contrary rule is established by the adjudication of courts of last resort in some other states, yet we do not feel that it is so radically wrong in principle, or so far removed from the weight and current of authority as to justify a departure from it in the case at bar. The most that can be said of the rule which we have followed is, that it is a mooted question on which eminent authorities differ. The position of this court has the approval of courts of last resort in such states as Pennsylvania, Massachusetts, Michigan, Wisconsin and Washington, and it is a rule under which contracts of insurance have been entered into in this state between assured and insurer for almost a generation, and unless it is clearly and unmistakably wrong, it should not be departed from in the interpretation of any contract entered into during the time that it

was in force. There is nothing in this rule of construction that can work any hardship or injustice to either of the contracting parties for insurance. If the underwriters do not desire to insure buildings situated on leased premises they can exclude this class of risks entirely from their liabilities, but as long as they provide conditions in their policies, under which buildings situated on leased premises may be insured, when fully advised of the extra hazard of insuring buildings so situated, it is no hardship to require them to make an inquiry as to the nature of the title of the insured to the grounds upon which the building is located, before accepting the premium and delivering a policy of insurance covering such risk. It seems to us, that as long as insurance companies desire to avail themselves of the profits that may arise from issuing policies on buildings situated on grounds to which the assured has not the fee simple title, they should either voluntarily carry the extra hazard of such risks or use ordinary diligence in inquiring as to the character of the title before accepting the benefit of the undertaking. We believe the rule of this court announced in *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537; *Insurance Co. of North America v. Bachler*, 44 Neb. 549; *Hanover Ins. Co. v. Bohn*, *supra*, and *Phoenix Ins. Co. v. Fuller*, *supra*, is sound in principle and should be adhered to.

We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LINCOLN TRACTION COMPANY V. LUCY A. HELLER, AD-
MINISTRATRIX.*

FILED JUNE 9, 1904. No. 13,549.

1. **Negligence: QUESTION FOR JURY.** Where the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a proper question for the consideration of a jury.
2. ———: **ACTION.** The violation of any statutory or valid municipal regulations, established for the purpose of protecting persons or property from injury, is, of itself, sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, followed and approved.
3. **Street Railways: LIABILITY FOR INJURIES.** Street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, followed and approved.
4. ———: ———. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and, to escape liability, it must show that it has discharged the full measure of its legal duty, and was in nowise to blame for the accident, unless defendant's negligence contributed thereto. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672.
5. **Trial: REVIEW.** Action of the trial court in refusing to enter judgment on a verdict not agreed to by all of the jury is correct.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Clark & Allen, for plaintiff in error.

Burr & Spencer, contra.

* Rehearing allowed. See opinion, p. 134. *post*.

OLDHAM, C.

Plaintiff, as administratrix of the estate of Thomas C. Heller, sued the defendant, the Lincoln Traction Company, alleging that through the negligence of the defendant, Thomas C. Heller was killed while being transported as a passenger on the defendant's car. The negligence charged in plaintiff's petition, briefly summarized, is, that there was no conductor on the car at the time deceased was injured; that the car was overheated; that the folding gate on the left side of the front platform was open; that the car was not provided with proper guards and fenders, was not a car of the latest pattern and was being operated in violation of the provisions of a city ordinance of Lincoln; that plaintiff's intestate while riding on the car became sick with vertigo and in attempting to leave the car fell from the front platform and was killed because of the dangerous and improper construction of the car. Defendant's answer was in substance a general denial and plea of contributory negligence. On issues thus joined there was a trial to the jury and verdict for plaintiff for \$700; judgment on the verdict, and defendant brings error to this court.

The first question called to our attention in the brief of defendant company is, that the evidence is not sufficient to sustain the judgment. This contention has necessitated a careful review of a lengthy bill of exceptions, in which we find competent evidence introduced by plaintiff tending to show the following material facts bearing on the cause of the injury: About 6 o'clock on the evening of the accident, plaintiff's intestate entered defendant's street car at 11th and O streets, presumably intending to go to his residence in the southeastern portion of the city. The car was being operated by a motorman, without a conductor, and fares for the passage were deposited in a box at the end of the car, arranged for that purpose. After the deceased entered the car, he sat down for a few minutes, and when the car had gone near to C and 14th streets, he arose and rang the bell, presumably to have the

car stopped for the purpose of permitting him to alight. Plaintiff's testimony tended to show the deceased had suffered from a sunstroke sometime before the injury, and that when overheated he was subject to dizziness and sometimes to vertigo. Two of the passengers on the car noticed that deceased appeared to walk unsteadily from the car when he approached the forward door. The motor-man was checking the car in obedience to his signal, preparatory to stopping it at the 14th street crossing, when the accident occurred. When deceased stepped on the platform of the car, according to the evidence of those who saw the accident, he reeled and pitched forward to the ground. His clothing was caught by either the projecting hub or the oil can on the side of the car and he was drawn along the rail on the track for probably twenty feet, where he was picked up with his skull crushed and most, if not all, of his ribs broken. Plaintiff's evidence showed that the car operated by defendant company was an old horse car that had been reconstructed into an electric car, and that the car was what one of their witnesses called a "bob-tailed" car, that is, it was shorter and narrower than a modern car constructed for electric lines; that the wheels of the car projected even with and beyond the sides of the car. A platform had been built out at each end of the car when it had been reconstructed, causing the ends to project beyond the wheels under the car, which gave it an unsteady and rocking motion. It was in evidence, without dispute, that there were no fenders at the end of the car and no wire netting or other guards at the sides to protect the machinery underneath. Evidence was also introduced on the part of plaintiff, tending to show that the car was in no sense one of modern construction; but on the contrary, that it lacked many of the essential appliances for public safety which are in common use by electric street railways at the present day. An ordinance, regulating street railways of the city of Lincoln, duly enacted in 1898, was introduced, which provided as follows:

"The cars shall be of the latest pattern and provided with suitable guards or fenders, and at night a headlight shall be fixed to the front dash, or upon the roof thereof, and each car shall be operated by a competent and skilled motorman, and also, at such times and places as shall be required for the safety of the public, and passengers upon said cars, by a conductor, and said cars shall not be propelled at a dangerous rate of speed. The motorman or conductor as the case shall be, in charge of said cars, shall at all times be prepared to make change to an amount not to exceed two dollars."

The allegations with reference to the car being overheated and with reference to defendant's negligence in not closing the gate on the front end of the car were taken from the jury by the trial court, and the cause was submitted on the question of defendant's negligence in the construction of the car, and its failure to provide a conductor as well as a motorman for its operation. In support of the allegation of the petition, as to the necessity of a conductor, evidence was introduced tending to show that the car passed along the streets on which there was a large amount of travel, and particularly so at the hour at which plaintiff's intestate entered the car. In opposition to this, defendant interposed testimony tending to show that the car in use was one of a pattern frequently used on modern electric railways, and that plaintiff was under the influence of intoxicating liquor at the time of the injury, and also that the presence or absence of a conductor on the car was in no wise connected with the injury. After a careful examination of the record in this case, we are convinced that the question as to whether or not the car in which deceased was riding was properly constructed and protected by modern fenders and guards, was, under the testimony offered, a proper question for the determination of the jury.

The question as to whether the absence of wire netting, fenders and guards around the car was the proximate or only a remote cause of the injury, was one depending on

a state of facts from which different minds might reasonably have drawn different inferences, and under a well established rule of this court a proper question to be left to the jury. *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37. It seems to us that the question of the presence or the absence of a conductor on the car at the time of the injury, is likewise one from which different inferences might have been drawn by fair and reasonable minds. This conclusion is well illustrated by the arguments of the learned counsel for the contending parties, in the case at bar. It is claimed by counsel for the company that the presence of the conductor on the car, if one had been there, could have made no difference to the protection thrown around the deceased; that if such an employee had been on the car he would have been on the rear end platform, waiting to assist passengers to alight or to enter the car when the 14th street crossing was reached, and would not have had his attention directed to deceased as a passenger needing special assistance in alighting from the car. On the contrary, it is urged by counsel for the administratrix, that if a conductor had been on the car and doing his duty he could not have helped taking notice of the fact that the deceased was a sick man, who needed assistance in alighting from the car, and that it is the duty of the street railway to protect sick and afflicted people, whom they have accepted as passengers, with such extra care as their condition reasonably requires. This illustrates how different minds may draw different conclusions from a fact which might or might not be a contributing cause to this injury. Again, the ordinance of the city, introduced in evidence, required a conductor, as well as a motorman, to be provided wherever the necessity of public travel required it, and this court has laid down the rule in *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, that "The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negli-

gence, if the other elements of actionable negligence concur."

Complaint is next urged against the action of the trial court in giving paragraphs 5 and 6 of instructions of the court, on its motion, which are as follows:

"When the plaintiff has shown that the deceased met with an injury, while being transported by the defendant, and plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death. This is true unless the plaintiff's own testimony shows negligence upon the part of the deceased, contributing to his death, as approximate cause thereof.

"The burden of proof is upon the plaintiff to prove by a preponderance of the evidence the other allegations of its petition, that the deceased received injuries while being transported by the defendant company resulting in his death, that by reason thereof the plaintiff has sustained pecuniary damages as alleged in the petition, and the amount of such damage, if any."

It is urged that these instructions erroneously shifted the burden of proof on the defendant to show contributory negligence when the fact of the injury had been established. It seems to us, however, that these instructions are fully supported by the doctrine announced in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, wherein SULLIVAN, J., speaking for the court said: "It is settled by the decisions of this court that street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's

negligence; and to escape liability it must show that it has discharged the full measure of its legal duty and was in nowise to blame for the accident."

It is last urged that the district court erred in not entering judgment on the first verdict returned by a jury in this case in the lower court. The facts underlying this contention are, that when the case was first called for trial in the district court, a jury was impaneled, testimony was offered and arguments delivered by counsel and the jury instructed and directed to return a sealed verdict in the morning. When the jury returned in the morning, the foreman passed up a general verdict, with answers to special findings submitted by the court. When the verdict and answers to the special findings were read, the court asked the jury if the verdict, and special findings, "Was the verdict of you all?" One of the jurymen answered in substance that it was not his verdict and that he did not agree to the special findings. The court thereupon gave additional instructions to the jury, and directed them to return to their room for further deliberation. After lengthy deliberation the jury reported that it was unable to agree and was discharged. Later in the same term another jury was drawn, and the trial proceeded anew. Counsel for the defendant company do not cite us to any legal principle, and certainly to no section of the statute, that was violated in refusing to receive the first verdict, when one of the jurors answered that such was not his verdict. In fact the court did just what section 290 of the code directs it to do, when on a poll of the jury one member answers in the negative.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

LETTON, C., concurs. AMES, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed January 18, 1905. *Judgment of district court reversed:*

1. **Common Carrier: INJURY: INSTRUCTION.** In an action against a common carrier on its common law liability for negligence to recover damages for an injury causing the death of a passenger, it is error to instruct the jury that, "When the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death."
2. **Case Approved.** *Lincoln Traction Co. v. Webb*, 73 Neb. —, approved and followed.

BARNES, J.

In this case Lucy A. Heller, as administratrix of the estate of Thomas C. Heller, deceased, recovered a judgment against the Lincoln Traction Company for alleged negligence, which it is claimed caused the death of the intestate. The company prosecuted error, and the judgment was affirmed. See opinion, *ante*, p. 127. A rehearing was ordered, and on the reargument it was strenuously contended that our opinion was wrong in approving of the 5th instruction given to the jury by the trial court, which reads as follows:

"When the plaintiff has shown that the deceased met with an injury, while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove, by a preponderance of the evidence, that it was not guilty of negligence, the proximate cause of his death. This is true unless the plaintiff's own testimony shows negligence upon the part of the deceased, contributing to his death, as approximate cause thereof."

We have just had a similar question under consideration in *Lincoln Traction Co. v. Webb*, 73 Neb. —, where we held that a like instruction was erroneous, because it placed the burden of proof on the wrong party.

Its effect being to shift the burden of proof from the plaintiff to the defendant, and because it also announced the rule that mere proof of injury, without more, raised the presumption of negligence on the part of the defendant company.

We cannot approve of the instruction quoted, for the reasons given in our opinion in the case last above mentioned. We have carefully read the record and instructions in the instant case to see if we could, in reason, adhere to our former opinion, but we are unable to do so. The instruction complained of is at variance with what we think is the true rule in such cases, and is quite inconsistent with the other instructions given by the trial court.

It appears that the deceased arose from his seat in the defendant's car, while it was in rapid motion, and without warning went to, and fell from, the front platform of the car to the ground; that he was caught by some part of the car and dragged some distance before it could be stopped, and that he died from the injuries thus received. The negligence charged was improper construction of the car; a violation of certain city ordinances; the want or lack of a conductor; and some other matters, none of which were of such a nature as to raise the presumption of negligence without direct proof of that fact. Therefore the instruction complained of was highly prejudicial to the rights of the defendant company, and falls clearly within the rule announced in *Lincoln Traction Co. v. Webb, supra*.

Our former opinion is therefore reversed and set aside, and the judgment of the district court is also reversed and the cause remanded for a new trial.

REVERSED.

FARMERS CANAL COMPANY ET AL. V. WILLIAM FRANK ET AL.

FILED JUNE 9, 1904. No. 13,370.

1. **Irrigation: PETITION: JURISDICTION.** By the irrigation act of 1895, the right to the use of water for irrigation purposes is attached to the land to be irrigated, and an application to the state board of irrigation for a permit to appropriate water for irrigation, which does not describe the location of the proposed canal nor contain a description of the land to be irrigated thereby, is too vague and indefinite to authorize the board to act, and no jurisdiction is acquired thereby to issue any permit thereupon.
2. **State Board: POWERS: DECISIONS: COLLATERAL ATTACK.** The powers of the state board of irrigation exercised under section 16, article II, chapter 93a of the irrigation act of 1895, are *quasi* judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked.
3. **Abandonment of Right.** Under the facts in this case, *held*, that the right of the Farmers Canal Company and its successor, Roberts Walker, to the appropriation of water awarded under the adjudication of the state board of irrigation has not been lost by abandonment.
4. **Nonuser: LIMITATIONS.** Nonuser must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property, in order to lose the right of appropriation.
5. **Constitutional Law.** The provisions of section 28, article II, chapter 93a, Compiled Statutes, *held* not to be inimical to any provisions of the constitution of the state of Nebraska.

ERROR to the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Wilcox & Halligan, for plaintiffs in error.

Charles F. Manderson, W. A. Dilworth and Wright & Stout, contra.

LETTON, C.

On the 14th day of April, 1902, William Frank, defendant in error herein, filed in the office of the secretary

of the state board of irrigation, his application for an appropriation of 2200 cubic feet per second of time of the water of the North Platte river for irrigating and other beneficial purposes, proposing to construct a canal about 150 miles in length and to irrigate about 150,000 acres of land. The point of diversion of the water and the line of the proposed canal being substantially the same as that of a canal, the construction of which had been begun by the Farmers Canal Company in March, 1888, but which had only been partially constructed to a distance of about 20 miles from the point of diversion and was only in actual use to such an extent as to water about 5,000 acres of land. In the application filed by Frank with the state board of irrigation, which application is made out upon a printed form furnished by the state board, the location of the proposed canal and the description of the lands which it is proposed to irrigate are set forth as follows:

"7th. That said ditch or canal will be *about 150 miles* in length, and pass through the following sections of land, as shown on the accompanying township plats, viz.: See plat herewith. (Describe each section through which the canal passes, stating township and range.)

"11th. That the proposed ditch or canal is to be built with the intention of supplying water to irrigate the following sections or quarter-sections of land, viz.: *All lands between the line of proposed canal and North Platte river, as shown by the accompanying plats* (give sections and quarter sections, stating number, township and range), amounting in all to *about 150,000 acres*. (Total number of acres.)" The words in italics are written, the others are printed in the blank form.

Accompanying this application were four blank township plats, but these plats are totally devoid of any indication as to what township, county or state they are intended to represent, and contain no line, mark or tracing to indicate the location of any proposed canal, or anything to show the lands it is intended to irrigate. In fact they are an absolute nullity so far as giving any information

in regard to the location of the proposed canal or the description of the land sought to be reclaimed is concerned.

There are two conflicting ideas upon which the laws of the several states and territories relating to the use of waters for the purposes of irrigation are based. One is that any person or individual may appropriate surplus waters which have not theretofore been appropriated, and may use the same to irrigate such lands as he may see fit. This was the basis of our irrigation law in this state until the passage of the act of 1895. Laws 1895, ch. 69. This system tends to breed monopolies, and to lead to antagonisms, strife and dissension. Since the land in arid regions is useless for the purpose of agriculture unless water is applied to it, this doctrine makes the landowner dependent upon the owner of the water right and leads to gross exactions and abuses. The doctrine of private ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. It has proved productive of endless controversies and abuses, and has given rise to interminable litigation.

The other doctrine is that the right to the use of water should never be separated from the land to which it is to be applied. "Where this doctrine prevails, canals and ditches become like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, but having no ownership in the property distributed." Report on irrigation in California, United States Agricultural Department, 1901. It is unnecessary to set forth here the advantages of this idea. By the adoption of the irrigation law of 1895, which was modeled upon the Wyoming law, this state adopted the latter policy, by which the right to use the water shall not be granted separate from the land to which it is to be applied, and that the right to use the water should attach to the land, and, when the land is sold, be sold with it; and, for this reason, the statute is

explicit in requiring a description of the land to be irrigated and the amount thereof to be set forth in the application.

Section 28, article II, chapter 93a, Compiled Statutes (Annotated Statutes, 6782), provides:

"Every person, association or corporation hereafter intending to appropriate any of the public waters of the state of Nebraska shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the state board for a permit to make such appropriation. Said application shall set forth the name and post office address of the applicant, the source from which said appropriation shall be made, the amount thereof as near as may be, location of any proposed work in connection therewith, the time required for their completion, said time to embrace the period required for the construction of the ditches thereon and the time at which the application of the water for beneficial purposes shall be made, which said time shall be limited to that required for the completion of the work when prosecuted with diligence, the purpose for which water is to be supplied, and if for irrigation *a description of the land to be irrigated thereby, and the amount thereof, and* any additional facts which may be required by the state board. On receipt of this application, which shall be *of a form prescribed by the state board* and to be furnished by the secretary without cost to the applicant, it shall be the duty of the state board through its secretary, to make a record of the receipt of said application and cause the same to be recorded in its office, and to make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the state board to determine the nature and amount of the proposed appropriation. If such an examination shows the application in any way defective it shall be the duty of the state board to return the same to the applicant for correction. * * *

Provided, however, That the state board, through its secre-

tary, may, upon examination of such application, endorse it approved for a less amount of water than the amount of water stated in the application, or *for a less amount of land* or for a less period of time for perfecting the proposed appropriation than that named in the application." (The italics are not in the statute but are inserted by the writer.)

The law further requires, upon the approval and allowance of an application, that the applicant shall file in the office of the state board, within 6 months thereafter, a plat which shall show, among other things, *the legal subdivisions of the land* upon which the water appropriated is to be applied. Further than this the approval of the application by the secretary may be for a *less amount of land* or less amount of water than asked for in the application; and the final certificate of appropriation provided for by section 21, article II, chapter 93a, Compiled Statutes (Annotated Statutes, 6775), is required to set forth a *description of the land to which the water is to be applied* and the amount thereof.

It will be observed that the application filed by Frank falls far short of complying with the requirements of the statute. It further disregards entirely the requests set forth in the blank form upon which the application is made. In the form furnished by the board, the applicant is requested to "describe each section through which the canal passes, stating township and range," and is further requested to give "sections and quarter-sections, stating number, township and range and total number of acres" of the sections or quarter-sections of land which it is intended that the proposed canal shall supply water to irrigate. None of this is done in Frank's application.

At the hearing before the board upon this application, protests were filed by the Farmers Canal Company and Roberts Walker who claimed to have a prior appropriation of water to irrigate the lands for a distance of 80 miles under the proposed canal; and a petition in intervention was filed by the Farmers Irrigation District, which had

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filed a subsequent application for an appropriation of water covering a part of the same territory. At the hearing, an opinion and order was rendered by the board of irrigation in favor of William Frank, Roberts Walker and the Farmers Canal Company, which confirmed the rights of the Farmers Canal Company and Roberts Walker to an appropriation of water as provided in an order of the board of irrigation made January 9, 1897; granted the application of William Frank, subject to the rights of the Farmers Canal Company, under the aforesaid order, and dismissed application numbered 675 filed by the Farmers Irrigation District, for the reason that the lands described in said application were covered by the canal of the Farmers Canal Company and by the application filed by William Frank prior to the filing of the application of the Farmers Irrigation District.

From this judgment of the board an appeal was taken to the district court for Scott's Bluff county. Issues were made up and a trial had before said district court, whereupon the order of the state board of irrigation was reversed and modified so that Roberts Walker was allowed an appropriation of water to irrigate the lands lying under the completed portion of the canal of the Farmers Canal Company; the application of William Frank was allowed and approved for all the lands lying under the contemplated canal east and beyond the constructed portion of the Farmers Canal Company, subject to the rights of the Farmers Canal Company, and the application of the Farmers Irrigation District was denied and dismissed. From this judgment of the district court, the Farmers Irrigation District, Roberts Walker and the Farmers Canal Company have prosecuted error proceedings to this court.

The application of William Frank failing to describe specifically the course of his intended canal, and to identify the specific tracts of land to which it is his intention to apply the water which he seeks to appropriate, does not state sufficient facts to justify the state board of irriga-

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tion to allow him any appropriation of water for irrigation purposes. The order of the state board granting his application is equally vague and indefinite, and fails to describe the lands to which the beneficial use of the water is to be applied, and so likewise is the judgment of the district court. Indeed, neither of these attempted adjudications could well be otherwise, since there is absolutely nothing in the application of William Frank, and nothing in the evidence, either before the state board of irrigation or the district court, which attempts to describe definitely and specifically a single tract of land which it is intended to irrigate. This being the case, neither the state board of irrigation nor the district court ever acquired jurisdiction to grant Frank's application. For these reasons, the application of William Frank should have been dismissed, and, since there has been a lack of jurisdiction to act since the first filing of the petition, we recommend that the judgment of the district court as to William Frank be reversed, but that, since his application was made in good faith, he be permitted to amend the same, if he so desire, without losing his right of priority.

There remains to be considered the issues raised between the Farmers Canal Company and Roberts Walker, on the one hand, and the Farmers Irrigation District, upon the other, and this will necessitate an extended examination of the facts as to the respective interests of these parties.

On the 16th day of September, 1887, the Farmers Canal Company, a Nebraska corporation, organized for the purpose of constructing an irrigating canal in Scott's Bluff and Cheyenne counties, hereinafter styled the company, posted notice of appropriation for the diversion of water from the North Platte river at a certain point in Scott's Bluff county, to the extent of 1142 6-7 cubic feet per second of time, to be used for the purposes of irrigation. The notice was duly filed for record in the office of the county clerk of Cheyenne county, at Sidney, Nebraska; Scott's Bluff county at that time being a part of Cheyenne county. On November 17, 1890, the same company posted notice of

additional appropriation of 200,000 cubic inches per second of time at the same point of diversion as the first notice, and on the same day filed the same with the county clerk of Scott's Bluff county with proof of the posting, and on March 12, 1895, the company posted another notice of appropriation at the same point of diversion, increasing the amount to be diverted to 225,000 cubic inches per second of time, and filed the same with the county clerk of Scott's Bluff county. All of said appropriations being for the purpose of irrigating lands lying under the proposed canal of the Farmers Canal Company. Under the plan of the company it was proposed to construct a canal 80 miles in length, of sufficient capacity to irrigate 80,000 acres of land. All of these notices were filed and appropriations made before the taking effect of the present irrigation law, which was passed and took effect April 9, 1895. The company began work upon its canal about the 1st day of March, 1888, and continued to work upon the same until about November 1, 1893. It erected a substantial headgate of sufficient size and capacity to irrigate the lands for which its appropriations were made, and expended in the erection of the headgate and on the construction of the ditch over \$80,000. The canal was excavated the full width for about the distance of a mile from the headgate, and for the distance of 19 miles farther at about half the full size. Below the end of the excavated portion on the line of the survey, it excavated two detached portions, together making about two miles of ditch. All of this work was done before the 1st of November, 1893, and since that time no actual construction work has been done upon the canal, but from time to time certain repair work has been done, either by the company itself, or by the owners or occupiers of lands near the portion of the ditch in which water was running, at the procurement or by the consent of the company. The company has issued permanent water rights to cover about 2,000 acres upon lands lying between the headgate of the canal and the end of the 21 miles constructed. The whole amount of lands irrigable by the company from

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the canal actually dug amounts to not more than 5,000 acres, but, on account of a washout in the canal, it has been impossible to use water on all of said land. After the passage of the present irrigation law creating a state board of irrigation and providing for the determination of the priorities of right to use the public waters of the state by the state board, the company filed its claim for appropriation in conformity with the notices of appropriation, and, on the 9th day of January, 1897, the secretary of the state board of irrigation adjudicated the claim and allowed the same.

The company in order to procure money for the carrying out of its enterprise issued bonds and gave a mortgage to secure the same, and, being unable to meet the payment upon said bonds, the bond holders, in 1902, foreclosed their lien in the United States circuit court, and the property was sold and conveyed to the appellant, Roberts Walker, who is now the owner of the franchise and property of the company.

After the passage of the act allowing the organization of irrigation districts, an irrigation district known as the Farmers Irrigation District was organized for the purpose of irrigating the land lying under the line of the Farmers Canal Company's proposed canal, and bonds of the district were voted to the amount of \$400,000 with the purpose of raising money with which to purchase the rights of the Farmers Canal Company, and to complete the canal. The district, however, was unable to dispose of its bonds, and, while the negotiations between the company and the Farmers Irrigation District were pending, William Frank, defendant in error, filed his application. After the filing of the application of William Frank, and on the — day of June, 1902, the Farmers Irrigation District filed with the secretary of the state board of irrigation its application for water to irrigate the lands within said district. The lands proposed to be irrigated in said application being about 50,000 acres lying below that portion of the canal of the Farmers Canal Company actually in operation, and

covering a portion of the same territory embraced in the application of William Frank, the line of the proposed canal being substantially the same as that of the Farmers Canal Company and of the proposed canal of William Frank.

The Farmers Canal Company contends that by the adjudication made in 1897, allowing its claim for the appropriation of water for a canal 80 miles long and allowing 1142 6-7 cubic feet per second, it became vested with the absolute right to an appropriation of water to that extent for the purposes of irrigation, and that it has a vested right therein which it has never abandoned nor lost by nonuser.

The Farmers Irrigation District asserts on the other hand, that the allowance of the claim to the Farmers Canal Company, in 1897, did not rise to the dignity of an adjudication of a perfected appropriation, but was merely an administrative order or allowance, only to be perfected by the actual application of the water to the land. It further contends that, even if the allowance of the state board constituted an adjudication, the Farmers Canal Company has lost all its rights beyond the line of the canal actually constructed and operated, by reason of abandonment and nonuser. It further contends that, under the constitution, an exclusive appropriation of water cannot be made so as to prevent the district from also making an application for water to irrigate the land within the district.

The first question which it is necessary to determine under these issues, is as to the status of the Farmers Canal Company and Roberts Walker with reference to the adjudication of priority of appropriation made by the state board of irrigation on the 9th day of January, 1897. This will involve a construction of certain sections of the act of 1895, found in sections 1-64, article II, chapter 93a, Compiled Statutes (Annotated Statutes, 6755-6886), being the general law relating to irrigation, and, in order to have a proper consideration of the meaning and intent of the legislature in the enactment of such provisions, it will be

necessary to consider the whole course of legislation in this state upon this subject, and the construction given to similar statutory and constitutional provisions by the courts of other states and territories. On February 19, 1877, an act was approved providing for the organization of corporations for the purpose of constructing and operating irrigation canals, and giving such corporations the necessary powers to carry out the purpose of their organization. Laws 1877, p. 168. In 1889 another irrigation law was passed, repealing the law of 1877, but covering the subject more extensively and supplying the deficiencies which experience had shown to exist in the operation of the former law. Laws 1889, ch. 68. It is a matter of public knowledge that, after the passage of these acts, many irrigation enterprises were commenced in the western part of the state, both by private individuals and corporations. These interests became so extensive, and the subject of irrigation of such economic importance, that, in 1895, new and comprehensive laws were enacted covering the entire subject of the application of the waters of the state by private individuals and corporations to a beneficial use, creating a complete and harmonious system for the determination of the respective rights of persons interested, and providing an orderly method of administration. At the time of the passage of the act of 1895 many persons and corporations had acquired vested rights in the appropriation of water for irrigation purposes. It was not the intention of the legislature to create confusion and stir up strife, controversy and litigation over the water rights theretofore acquired, but it is manifest from a consideration of the law of 1895 that, among the main inducements to its passage, were the features requiring the adjudication of the priorities of appropriation upon all the streams of the state up to the time of the passage of the act, and the creation of a state board of irrigation whose records would evidence the priorities of title to the appropriation of water in such a public manner that no one might be misled. Publicity of

right and stability of title were matters which the legislature evidently intended to establish so far as lay within its power, and the provisions of the law under consideration seem admirably fitted to accomplish this object.

The first 27 sections of the act apply mainly to rights already vested, they provide for a division of the state of Nebraska into two water divisions and fix their boundaries, and for a state board of irrigation consisting of the governor, attorney general and the commissioner of public lands and buildings.

Section 16 is as follows: "It shall be the duty of the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state, which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated. The method of determining the priority and amount of appropriation shall be determined by the said state board, which at its first meeting shall designate the streams to be first adjudicated."

Section 21 provides for the issuance of a certificate by the state board to the appropriators, setting forth the name and post office address of the appropriator, the priority number of each appropriation, the amount of water appropriated, the amount of prior appropriation and a description of the land to which the water is to be applied and the amount thereof.

Sections 22 to 25, inclusive, provide for appeals to the district court by any persons feeling themselves aggrieved by the determination of the state board.

Sections 26 and 27 provide for the transmission by the county clerk of each county of a transcript of all claims to the appropriation of water then on file in their respective offices to the secretary of the state board, and for the classification and arrangement of said claims by him.

It will be apparent from an examination of these provisions that it was the intent and purpose of the legislature

thereby to provide a tribunal and a method of procedure whereby the respective rights of priority of appropriation of all persons should be finally fixed, settled and determined in such a manner as to create a public record of all rights to the use of the waters of the state by appropriators up to the time of the act, and from which other persons desiring to appropriate water could learn the exact status of the title to the water in each stream.

Sections 28 to 31, inclusive, institute a new method of procuring appropriations of water up to that time not appropriated. The old method, by posting notices and filing copies of the same in the office of the county clerk, was done away with, and in its stead it was provided that an application should be made to the state board for a permit to make the appropriation. They provide for action upon this application by the state board, and for an appeal from the action of the board by any applicant feeling himself aggrieved; and also provide for a certificate that the application has been perfected in accordance with law in like manner as in the preceding sections.

Sections 32 to 64, inclusive, being the remainder of the act, consist mainly of general provisions creating a system of supervision of the use of the waters of the state, granting the right of condemnation to appropriators, providing penalties against the wrongful diversion of water, regulating the rights and duties of ditch owners with reference to public highways, and providing for many other matters of administrative detail which are not of importance in the consideration of this case.

It appears that after the organization of the state board of irrigation, in pursuance of the duties imposed upon it by section 16 of the act, the board proceeded to determine the priorities of right to use the waters of the North Platte river, after giving notice to persons interested. That, after the hearing upon the claim of the Farmers Canal Company, the state board, by its secretary and state engineer, entered the following order: "The claim set forth in this record is for a right to the use of a portion of the

water of the North Platte river for irrigation purposes, and is made by virtue of posting three notices of appropriation at the proposed point of diversion, No. 1 being posted on the 16th day of September, 1887, and filed for record in the office of the county clerk of Cheyenne county, at Sidney, Nebraska, on the 19th day of September of the same year. No. 14 was posted on the 17th day of November, 1890, and filed for record the same day. No. 43 was posted on the 12th day of March, 1895, and filed for record in the office of the county clerk on the 14th day of March, 1895, and commencing the work of excavation and construction upon a proposed ditch or canal on or about the 1st day of March, 1888.

"It appears from the record in the matter of this claim:

"1st. That the name adopted for the ditch or canal is the 'Farmers Canal.'

"2d. That the source of the appropriation is the North Platte river.

"3d. That the object of the appropriation is the irrigation of lands.

"4th. That the work of actual construction was begun on or about the 1st day of March, 1888.

"5th. That the priority of the appropriation dates from the 16th day of September, 1887, when the first notice of appropriation was posted at the proposed point of diversion.

"6th. (a) That the priority number of the appropriation for the water-shed is No. . . . , Water Division No. 1-A: (b) That the priority number of the appropriation for the stream is No. . . . , North Platte river.

"7th. That the ditch, or canal, heads on the north bank of the stream in the S.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 3, T. 23, N. R. 58, west of the 6th P. M., near the west line of Sec. 10, T. 23, R. 58.

"8th. That said ditch is about 81 miles in length and passes through the following described lands, viz.: Beginning at a point on the north side of the North Platte river, near where the river intersects the west line of sec.

10 in T. 23, R. 58, in Scott's Bluff county, Nebraska, on the N.W. $\frac{1}{4}$ N.E. $\frac{1}{4}$ of said section 10, thence through and over the E. $\frac{1}{2}$ N.E. $\frac{1}{4}$ N.E. $\frac{1}{4}$ S.E. $\frac{1}{4}$ of said section 10 * * * (and describing about 140 other tracts). * * *

"9th. That said ditch or canal covers and reclaims the following described lands, viz.: a part of Lot 1, T. 22, R. 58; parts of Lots 1 and 2, in Sec. 11: Lots 1 and 2 and a part of N.E. $\frac{1}{4}$ N.E. $\frac{1}{4}$, Sec. 14 * * * (and further descriptions of land covering over three typewritten pages of legal cap) * * * amounting in all to about 80,000 acres.

"The claim is allowed subject to the following limitations and conditions, viz.:

"1st. The water appropriated shall be used for the purpose of irrigation.

"2d. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

"3d. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths (1142 $\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth ($\frac{1}{70}$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904."

This order and allowance is the adjudication under which the Farmers Canal Company and Roberts Walker claim.

In the larger number of states and territories within the arid section of this country, the usual method of obtaining the right to an appropriation of water for irrigating purposes is by means of posting a notice at the point of diversion, filing a copy of such notice in the office of the county clerk of the county in which the point of diversion lies,

diverting the water and actually applying it to the beneficial use for which it is sought to be appropriated, at the place designated in the notice. The experience of many years shows that this method often led to strife, contention and sometimes to bloodshed, on account of the lack of a clear record of the rights of claimants. In order to remove this state of affairs, in Colorado and Washington, the legislature vested the district court with special jurisdiction, for the purpose of determining the respective priorities of rival appropriators of water, by a special proceeding somewhat in the nature of a bill of peace, bringing in all parties interested and adjudicating their rights and priorities. This method proved to be a great improvement upon the loose methods theretofore existing, and has proved exceedingly satisfactory to the people of these states.

Following this idea and improving upon it, the state of Wyoming, having experienced the same difficulties with reference to controversies between water claimants, in its constitution established a new system with reference to the matter of irrigation, and adopted an entirely new scheme for the adjudication of rights, the appropriation of water, and for the administration of rights to the public waters of the state. An act was afterwards passed by the legislature of that state to carry out these constitutional provisions. In this act there was created for the first time by any of the states or territories a state board of control, which was given *quasi* judicial powers in regard to the ascertainment and adjudication of the rights of appropriators of the public waters of the state which had vested up to that time, and to which board was further committed the allowance of claims to, and the general regulation of, all rights to water thereafter. The Nebraska statute of 1895 is substantially an adoption of the Wyoming system. While the state board of irrigation is differently constituted from the board of control in Wyoming, its powers and functions are the same, and the provisions of the section by which the board was directed to begin the deter-

mination of the priorities of right to use the waters of the state are identical with those in the Wyoming act.

In *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 50 L. R. A. 747, 87 Am. St. Rep. 918, the constitutionality of this act was upheld, and, among other matters, the court held that the proceeding to determine priorities is not a part of the process by which an individual appropriation is completed, but the proceeding is instituted by the board in an official capacity, representing the public for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters. A part of the object also is public recognition of an appropriation previously made and the issuance of documentary evidence of title. In *Crawford Co. v. Hathaway*, 67 Neb. 325, the same attack was made upon the constitutionality of the Nebraska law, and this court reached the same conclusion as the Wyoming court. It would seem that an adjudication made by the state board of irrigation upon a matter properly before it, and within the scope of its powers and duties, is final, unless appealed from to the district court. Its action stands upon a somewhat similar footing to that of county boards in passing upon claims against their respective counties. It has been held repeatedly that when a county board acts upon claims against the county, the amount of which is not specially fixed by the statute, its action is judicial in its nature and, unless appealed from, is final. Indeed, if the determinations of the state board of irrigation with reference to the priorities of appropriators are not of this final character, of what benefit or use would they be? For the board to attempt to decide a controversy or to establish a right, when, in fact, after it had acted, no right was established or controversy settled, would be a vain thing. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*, 67 Neb. 377.

In Colorado the findings and adjudications of the district

court, while acting as a special tribunal to determine priorities and amounts of appropriation, are *res judicata*. *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357; *Platte Valley Irrigation Co. v. Central Trust Co.*, 32 Colo. 102. The proceedings before the board of control in Wyoming and the state board of irrigation in Nebraska, in determining priorities, are essentially the same as the proceedings before the district court in Colorado, when it sits for the purpose of adjudicating priorities, and their findings and adjudications are of like weight.

While the transcript of the proceedings before the state board, by which the priorities of appropriation of the Farmers Canal Company were determined in 1897, does not set forth in full the three notices of appropriation which were posted under the former law, nor fully set forth the original claim which was filed before the board, still the adjudication based upon the notices and the prior appropriation describes specifically the lands through which the ditch passes, and sets forth definitely the government subdivisions which the ditch or canal covers and reclaims, and there is no provision in the statute requiring any formal application to be made in such proceedings, or anything more than the copy of notices filed in his office to be furnished by the county clerk. A very large portion of the land covered and reclaimed is described as "a part of" a government subdivision. While this is somewhat indefinite, it will be taken to mean all that part of the government subdivision described which is capable of irrigation, and the description is not so indefinite, when it is taken and considered in connection with the actual construction of the canal and laterals, as to be incapable of identification.

In the order adjudicating the priority of appropriation of the Farmers Canal Company, the state board fixed a limit of time for the completion of the application of water to the beneficial use proposed. Since the board was acting, not upon an application for a permit to appropriate water under the provisions of sections 28 to 31, inclusive, of

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the act, but derived its power to adjudicate priorities from sections 15 to 27, inclusive, and was acting under the provisions of those sections at that time, it had no authority in such a proceeding to make such order. Its sole duty was to ascertain and determine existing rights, not to grant new and conditional privileges in that proceeding, without an application for a permit. Its order limiting time, therefore, was null and void.

Though the board in adjudicating the claim of the Farmers Canal Company, in all probability, acted erroneously, and made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, still, it had jurisdiction to hear and determine, and no appeal having been taken from its determination, its order allowing the appropriation is final and cannot be attacked collaterally. This conclusion is not in conflict with the principle laid down by the learned district court, that an appropriation is not complete unless the water is applied to a beneficial use within a reasonable time. All applicants for a new appropriation made after the passage of the act under the regulations laid down therein must comply with this rule, and complete the appropriation by applying the water to the land before their appropriation is complete, their right is vested, and they are entitled to a certificate.

The next question presented is, whether the Farmers Canal Company has lost its right to the appropriation by abandonment. There can be no question from the evidence that the company never actually gave up the possession of the ditch so far as it was actually constructed, nor had it or its successor Roberts Walker ever given up the idea or intention of completing the canal to the full extent of its appropriation. Abandonment is a mixed question of law and fact. There must be both a relinquishment of possession or nonuser of the right granted, together with the intention to abandon. Mr. Long in his work on Irrigation (sec. 85) says: "Abandonment is a matter of both intention and act, and consists in the

relinquishment of possession without any present intention to repossess. Mere nonuser is not in itself an abandonment, though, if continued for a sufficient length of time, it may result in a forfeiture of the water right by prescription."

Whether an act of a party constitutes an abandonment of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it. But mere absence from and nonuser of the property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. *Derry v. Ross*, 5 Colo. 295; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Richardson v. McNulty*, 24 Cal. 339; *Judson v. Malloy*, 40 Cal. 299; *Mallett v. Uncle Sam Gold & Silver Mining Co.*, 1 Nev. 188; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056.

The question is to be determined by the evidence in each particular case, and, in the case at bar, we hold that the evidence is not sufficient to show that the Farmers Canal Company or Roberts Walker ever abandoned its appropriation for the uncompleted portion of the canal. As to nonuser, we are of the opinion that, unless the nonuser has existed for a length of time requisite to obtain a title by prescription under the laws of the state, it will not be sufficient to divest the right of an appropriator of public waters. Mr. Long says, in section 83, "If the appropriator has in fact abandoned his right, the length of time for which he has ceased to use the water is wholly immaterial, for the moment the abandonment itself is complete, the rights of the appropriator are extinguished. But in the case of mere nonuser, the rights of the appropri-

ator are not affected until he has failed to make any beneficial use of the water for the prescriptive period, when they become extinguished."

In California, the time fixed by law for the limitation of action to recover real property is five years, and by analogy the courts hold the same period is requisite to divest the title to water by nonuser, and this idea seems to prevail in other arid states. Nonuser must be continued for a time equal to the statutory limitations upon actions to recover the possession of real property, in order to lose the right of appropriation. The evidence in this case fails to show a nonuser of the appropriation for the term of ten years before this action was commenced. Hence, the Farmers Canal Company had not lost its appropriation by nonuser.

We hold, therefore, that Roberts Walker and the Farmers Canal Company were, at the time of the beginning of this proceeding, the owners of, and entitled to, an appropriation of water to the extent, and for the purpose, as allowed to them by the state board of irrigation in 1897.

In this connection it should be observed that these considerations do not apply to cases where an application for water has been granted by the state board, and the applicant has failed to complete the work within the specified time. Nor do we mean to say that an irrigation company may refuse or neglect, with impunity, to supply water to persons for whose lands it has been allowed to appropriate the same. The law grants to corporations of this character valuable rights, but with these rights are accompanying duties to the landholders for the irrigation of whose land the rights are granted, and if these obligations are not fulfilled, the law will interfere at the request of the party injured.

The irrigation company does not own the water; it is only the servant of the public to carry it to the land for which it has been appropriated, and this service it is bound to perform.

There remains the important question, whether or not the appropriation of the Farmers Canal Company and Roberts Walker should be held to be exclusive in its character, and whether the granting to the same makes it imperative upon the state board and upon the courts to refuse a subsequent application for an appropriation of the surplus waters from the same stream, for the purpose of irrigating the same land.

It is admitted by the agreed statement of facts that there is unappropriated water in the North Platte river sufficient to supply the application of the Farmers Irrigation District. Section 28 of the act of 1895, so far as it affects this question, is as follows: "If there is unappropriated water in the source of supply, named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same. * * * If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force."

If the language of this section is to be construed literally, there is no doubt that the action of the court, dismissing the application of the Farmers Irrigation District, is correct. The contention of the Farmers Irrigation District with reference to this section is that it should be construed as though it read, "or if a prior appropriation has been perfected," and that, unless a prior appropriator has actually completed his appropriation by an application of the water diverted to the land sought to be irrigated, no "prior appropriation" in the language of the section has been made. They further urge that a literal construction of this provision would be in violation of section 15, article 3 of the constitution of the state of Nebraska, providing: "The legislature shall not pass local or special laws * * * granting to any corpo-

ration, association, or individual any special or exclusive privileges, immunity, or franchise whatever." And further that it contravenes the provisions of section 16, article 1, providing that no law "making any irrevocable grant of special privileges or immunities, shall be passed."

The object of the law in question is the promotion of irrigation within the state of Nebraska by a just and fair apportionment of the waters of the state among its people in such manner as to utilize the waters to the fullest extent. To this end the state has in a manner seized upon these waters, and, as a matter of police regulation, for the public benefit has prescribed certain rules applicable to all persons alike regarding the methods of procuring the right to the water, the quantity to be applied to each acre, and the preservation of rights which have become vested. As in all other states and territories where irrigation is practiced, priority of appropriation gives priority of right, and no person or corporation is favored more than another. The law gives to every citizen of the state the right, upon complying with certain prerequisites, to appropriate for beneficial purposes the unappropriated public waters of the state, and it protects him in the enjoyment of this appropriation after his right is once vested. He takes this right, however, subject to the rights of all prior and subsequent appropriators, and he cannot infringe upon their rights and privileges. Section 20 of the act provides: "That such appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made."

Section 42: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided."

Section 43: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better

right as between those using the water for the same purpose."

It is the evident purpose of the law, taken as a whole, to enforce and maintain a rigid economy in the use of the waters of the state. It has been, and is, the policy of the law in all the arid states and territories to require and enforce an economical use of the waters of the natural streams. The urgent necessities of the situation compel this policy by the very force of circumstances. One of the main objects of the system of administration of public waters prescribed throughout the arid regions is to restrain unnecessary waste, and to provide for an economic distribution of that element so necessary to the very existence of agriculture in those regions. This is also the policy of the state of Nebraska in its regulation of the use of the waters of the state, and the law should be construed so as to effect a reasonable, just and economic distribution of water for irrigation purposes. The court will take judicial notice of the fact that there are hundreds of acres within the state susceptible of irrigation to every acre which there is water enough to supply, and it is obvious that a construction of the law that will best distribute the use of the waters is to be preferred, if such construction is not inimical to any constitutional inhibitions or limitations.

The person making the first application for the use of water to water any particular tract of land is given by the law an exclusive right to the water, so long as he applies it to the beneficial use, and is granted, therefore, in a certain sense, a monopoly of the use of the water which he has been allowed to appropriate. But this monopoly or privilege, while exclusive in its nature, is not such a special privilege or immunity, a grant of which the constitution seeks to prevent. In the very nature of things, a grant of water for irrigation purposes which was not exclusive would be worthless. Unless his right to use water to a certain extent was sure and certain no person would be guilty of such folly as to attempt the pursuit of

agriculture in an arid region, when the supply of the only agency by which he might hope to raise a crop might be cut off by another claimant. The privilege granted by the operation of the act is not "special." On the contrary it is general in its operation, and applies to every citizen of the state who seeks to avail himself of the use of the public waters. It is obvious that, if an appropriation of a certain amount of water is allowed to an individual to water a certain tract of land, and out of the surplus waters in the stream a subsequent appropriation of water is made to the same extent to water the same land, there is thereby withdrawn from use by other persons who may desire to use it an amount of water equal to one of these appropriations, and that an area of land equal to that which the appropriations cover is deprived of the benefit of irrigation. Instead of the refusal to allow a subsequent appropriation of water to water the same land creating a monopoly, it would rather seem that to deprive another applicant of the use of water, by granting the right to use a double appropriation upon one piece of land, would tend to create a monopoly. It is objected that the exclusive right granted to a canal company to carry the water to the land to be benefited may be subject to abuse by extortionate charges, but the public have an interest in such a corporation, and the law may interpose if necessary for the protection of the individual. *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*, 67 Neb. 377. Further, the construction of works of the magnitude required to carry on extensive schemes of irrigation requires the expenditure of large sums of money, and it was no doubt the intention of the legislature to protect the men who put their money into such enterprises from the risk of loss by being unable to dispose of the water after it had been carried by them to the land upon which it was designed and appropriated to be used. The object of the law was to encourage, not to repress, irrigation enterprises. The right to prescribe the manner of using the waters of the state, and apportioning the use among the

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people of the state, rests with the legislature, and is a proper exercise of its general police powers. The provisions preventing two appropriations of water for the purpose of watering the same land seem to be a just and fair exercise of this power, and rest upon sound policy.

It is unnecessary to consider further the validity of the provisions of the statute under consideration. The legislature having spoken, unless its language contravenes the constitution it is final. While it may be conceded that the legislature took a step farther than that of any other state or territory up to that time, in thus specifically declaring that an appropriation should be refused if a prior appropriation had been made to water the same land, yet we see in such provision nothing which is contrary to any constitutional provisions.

We recommend, therefore, that the decree of the district court be reversed and this cause remanded to the district court, with directions to enter judgment in favor of the Farmers Canal Company in accordance with this opinion, and with directions to remand the application of William Frank and Farmers Irrigation District to the state board of irrigation with leave to amend, if desired, and for further proceedings in accordance with this opinion.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and this cause remanded to said district court, with directions to enter judgment in favor of the Farmers Canal Company in accordance with this opinion, and with directions to remand the application of William Frank and Farmers Irrigation District to the state board of irrigation with leave to amend, if desired, and for further proceedings in accordance with this opinion.

REVERSED.

STEPHEN B. SCACE V. WAYNE COUNTY.

FILED JUNE 9, 1904. No. 13,455.

1. **Eminent Domain: DAMAGES.** The provisions of section 21, article I of the constitution, allow a person whose property has been taken for a highway, not only the fair market value of the land actually taken, but also such additional damages as accrue to the remainder of the tract by reason of the opening of the road.
2. **Highway: DAMAGES.** Where a highway is laid out by which a tract of land is divided into two parts, the depreciation in value, if any, of the entire tract, after deducting any special benefits which may accrue by reason of the opening of the road, is a proper element of damage.
3. ———: ———. The rights of the owner of land over which a section line extends are the same, with reference to the assessment of damages for the location of a highway thereon, as those of the owners of other real estate. The statute making all section lines public roads merely dispenses with the necessity of a petition and other formal proceedings before the county board is authorized to open the road.

ERROR to the district court for Wayne county: JOHN F. BOYD, JUDGE. *Reversed.*

Wilbur & Berry and Allen & Reed, for plaintiff in error.

H. E. Simon, contra.

LEITON, C.

The plaintiff in error, Stephen B. Scace, is the owner of 313 acres of land adjoining the city of Wayne, part of the same lying in section 16 and part of it in section 17. A road was established by the county commissioners of Wayne county on the section line between sections 16 and 17 across his land. The entire tract was fenced in one body and was used by the plaintiff to furnish pasturage for hire to the inhabitants of the adjoining city of Wayne for their horses and cattle. The tract was irregular in shape. The proposed road entirely cut off and separated one 80 acre tract from the remainder of the

pasture and deprived the plaintiff of the use of a well, windmill and tank situated upon the land taken for the road, and necessitated removing the fence, or building a new one half a mile long. Before the road was established, a notice was published by the commissioners fixing the 25th day of May, 1901, as the time for the presentation of claims for damages by reason of the opening of the road, and on May 24 the plaintiff in error filed a claim in the sum of \$2,500 for damages accruing to the 80 acres on each side of the road immediately adjoining the proposed highway. On May 25 appraisers were appointed to ascertain and fix the amount of damages sustained by the claimants by reason of the establishment of the road. On the same day the appraisers reported, assessing the damages to the plaintiff in error at the sum of \$340. On the 1st of June Scace filed an application for an extension of time for making proof and the hearing of his claim for damages until June 17, and on the same day a resolution was adopted that the road be opened and worked as a public road, and the hearing of Scace's and all other claims for damages was continued to the 17th day of June, 1901. On the 17th of June Scace filed another claim for damages in the same amount, to wit, \$2,500, but this claim differs from the first claim filed by him in that it seeks to recover damages to the whole tract of 313 acres, instead of to 160 acres as in the first claim. A hearing was had, fixing and assessing the damages to Scace at \$375, from which an appeal was taken by him to the district court. He filed a petition in the district court, claiming that he was damaged by the taking of his land and for damages to the entire tract in the sum of \$3,985. Before the trial in district court, a motion was made by the defendant in error to require the plaintiff in error to elect whether he will submit the case as on appeal from the action of the county board or as an original action in this court, which motion was sustained by the court, and exception taken by the plaintiff, whereupon he elected to submit the case as an appeal from the action of the board of

county commissioners. This is the first assignment of error made by the plaintiff in error. The petition in error contains 90 other assignments, of which it will only be necessary to consider one or two.

We have been unable to ascertain from the record that the plaintiff was in any wise prejudiced by being required to elect whether to proceed as upon appeal or as an original action. We do not think the action of the district court in requiring his election was erroneous, though it was probably unnecessary, since the cause was in court upon appeal as it was, and this election did not change the status of the case.

From an examination of the rulings of the trial court upon the introduction of evidence, and of the instructions to the jury, it is apparent that the jury were confined in their estimation of damages to the fair market value of the land actually taken, together with the expenses of moving the fence. The plaintiff in error testified that the value of the land before taking for the road was \$125 an acre, and offered to show what the value of the entire tract was after the taking of the one-half mile strip for the road, which offer was rejected by the court. The court also refused to allow him to show that the principal value of the land was for pasturage, and to show the effect on its value for that purpose that the cutting off the 80 acre tract would have. It is clear that a tract of land may, on account of its close proximity to a town or city, be enhanced in its value by reason of its advantage of situation for pasturage purposes. If this be so, then the person from whom it is taken, or whose estate in it has been diminished in value, should be allowed to recover the entire pecuniary injury which he has suffered, and should be permitted to prove the value of the entire tract of land before and after the taking, for whatever purpose it may be used, as the means of ascertaining whether he has been damaged by the taking thereof. Instruction numbered one given by the court upon its own motion is as follows: "You are instructed that the only issue for you to deter-

mine in this case is the fair market value on the 1st day of June, 1901, of the 3 and 95-100 acres of land taken by the defendant for a public highway, and the reasonable expense of moving the fence therefrom to the side of the road." Instructions were asked by the plaintiff in error to the effect, in substance, that the damages recoverable in such a case are not confined to the market value of the land taken, but that the plaintiff would be entitled to recover damages to the remainder of his adjoining or abutting lands, if any, shown by the testimony, and that he should be allowed damages, not only for the value of the land actually taken, but for the permanent depreciation, if any, in the value of the entire tract of land. These requests were refused.

Section 21, article I, of the constitution of 1875, provides:

"The property of no person shall be taken or damaged for public use without just compensation therefor." It has been the settled doctrine of this court since the adoption of this provision that, whenever the property of any person has been injuriously affected by the appropriation of the property itself, or property adjoining, for public purposes, the person injured has been entitled to recover the actual damages suffered by him. The words "or damaged" were not contained in the constitution of 1866. The object of the insertion of these words in the constitution of 1875 was, as is said in *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550: "To grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large." This court has so often construed this constitutional provision that it is unnecessary to discuss it further. *Schaller v. City of Omaha*, 23 Neb. 325; *City of Omaha v. Kramer*, 25 Neb. 489; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *McGarock v. City of Omaha*, 40 Neb.

64; *City of Harvard v. Crouch*, 47 Neb. 133; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239. The instruction given by the trial court was erroneous, and the refusal to instruct that the plaintiff in error was entitled to damages for the depreciation, if any, in the value of the remainder of the tract was also prejudicial error.

As to the contention of defendant in error that, since the statute makes all section lines public roads, and that the plaintiff bought the premises charged with knowledge of these statutory provisions, and hence must be deemed to have accepted the property with the burden of the liability to damage by the taking of the same by the public, we have only to say that the object of the statutory provisions was to avoid the necessity of the filing of a petition before a road upon a section line could be opened. The status of land over which a section line runs is no different from that of other real estate, and the property rights of the owner of such land are as fully protected by the constitutional guarantees as are those of the owner of any other real estate. The provisions of the statute merely dispense with the necessity of a petition for the location of the road before the county board can act upon the matter.

For these reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM BROWN, APPELLANT, v. VICTOR REED, APPELLEE.

FILED JUNE 9, 1904. No. 13,482.

1. **Equity.** Where an adequate remedy exists at law equity will not assume jurisdiction.
2. **Evidence examined, and held** to sustain the findings and judgment of the district court.

APPEAL from the district court for Boone county: **JAMES N. PAUL, JUDGE.** *Affirmed.*

H. C. Vail and Rose Bros. & Reid, for appellant.

R. F. Williams, contra.

LETTON, C.

This is an equity proceeding brought by William Brown as plaintiff, hereinafter named the plaintiff, against Victor Reed as defendant, hereinafter named the defendant, for the purpose of obtaining an injunction to restrain the defendant from driving away the plaintiff's cattle from certain fields of cornstalks and from certain yards, feed pens and water tanks of defendant, and from preventing the plaintiff's cattle from having access to and being fed certain straw and cornstalks, which the plaintiff alleges were the joint property of the plaintiff and defendant. In substance, the plaintiff's claim is that he and the defendant, who both reside in Nance county, Nebraska, and are each engaged to some extent in the business of feeding and raising live stock, the plaintiff owning at this time about 105 head of cattle and defendant about 60 head, made an agreement whereby the cornstalks and straw situated upon certain sections of land in Boone county should be purchased for their joint benefit; that the defendant would furnish yards and water for said cattle upon land he owned in section 12 in Boone county; that the plaintiff would furnish additional water tanks, feed racks and wind-

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breaks for all of the stock, and that a man should be hired to care for the stock whose wages should be paid jointly; that the plaintiff furnished the tanks, erected the feed racks and wind breaks upon the defendant's place; that a man was hired by both parties, and that the plaintiff paid for his share of the cornstalks and straw and drove his cattle to the defendant's premises in accordance with the agreement, but that the defendant wrongfully drove the plaintiff's cattle away and refused to allow them to remain on the premises. The evidence on the part of the plaintiff, if it stood alone, tends to substantiate this contention. The defendant's evidence, however, is in substance to the effect: That early in September, 1901, he had purchased the straw, feed and cornstalks situated upon section 13 in Nance county, Nebraska, from one Eli Harvey, the foreman of P. D. Smith, who was the owner of the land. That shortly afterwards he was in Genoa, Nance county, in the plaintiff's saloon, and in the course of conversation mentioned the fact that he had bought this feed, or "roughness," as it was called. That the plaintiff asked him if he could buy some in that locality for him, as he had about a hundred head of cattle he desired to winter, and that at the plaintiff's request the defendant bought from Harvey for him for \$70 a number of straw stacks situated on section 15 in Nance county, also belonging to P. D. Smith, and that the plaintiff paid the defendant the \$70 which he had expended in this purchase. That afterwards arrangements were made between them whereby the defendant agreed to let the plaintiff put his cattle with the defendants; that they should hire a man jointly to herd them; that the defendant would allow them to be kept in his corral, and that the plaintiff should furnish such additional feed racks and water tanks as were made necessary by the bringing of his cattle there, the defendant having sufficient appliances in the way of feed racks, water tanks and windmill to care for his own cattle, but not for the additional number if plaintiff's were added.

It was a condition of the sale of the stalks by Harvey that no cattle with cockle burrs upon them should be allowed on the place, and the defendant's testimony goes to show that it was made a condition by the defendant that the plaintiff's cattle should be native cattle and be free from cockle burrs. The plaintiff's cattle were driven to the defendant's place in the latter part of November, 1901. The defendant had Mr. Kilham, the hired man, write the plaintiff a letter to the effect that his cattle had come; that he had said they were free from cockle burrs, and that they were full of burrs, and refusing to allow them to come into the stalks until the burrs were taken out, telling him he would have to go up there and attend to it; and the next day the defendant drove to Genoa and told the plaintiff that he must take his cattle home. Plaintiff failing to do this, defendant drove them to the farm of the plaintiff's father and refused to allow them on his place. The trial court found generally for the defendant, dismissed the action and dissolved the temporary injunction which had been granted.

We are unable to see any grounds for the interposition of a court of equity in behalf of the plaintiff in this case. He has utterly failed to show that he is without an adequate remedy at law.

There is no allegation in the petition that the defendant is insolvent, and the evidence shows that he is financially able to respond for any damages which the plaintiff may have suffered. There is no testimony in the record except the mere statement by the plaintiff, that he did not know of any other feed of like nature to be procured in the neighborhood, to show that he might not have bought in the open market all the feed necessary for his cattle, and that the ordinary process of law would not afford him a full and adequate remedy for all loss which he might suffer. There is evidence on the part of the defendant to show that there was plenty of feed in the immediate neighborhood which he might have procured. In fact, Harvey testifies that he had plenty of stalks on section

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15 that he wanted to sell and that in February he sold 105 acres of stalks to the defendant. Aside from these considerations, however, we are of the opinion that the plaintiff has failed to sustain the burden of proof which rests upon him. A large part of the testimony of his witnesses is reconcilable with the defendant's theory of the transaction, and the documentary evidence strongly tends to substantiate the defendant's position. The trial court with all the witnesses before it found for the defendant, and we are satisfied that its decision upon the facts and law of the whole case was correct and should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EDWARD J. SMITH, TRUSTEE, APPELLEE, v. JONAH B. ALLEN
ET AL., IMPEADED WITH JAMES A. OLLIS, JR., APPELLANT.

FILED JUNE 9, 1904. No. 13,527.

1. **Mortgage Foreclosure: DEFAULT: RES JUDICATA.** Where a cross-petition for the foreclosure of a mortgage alleges that one of the defendants assumed and agreed to pay the mortgage debt, and no answer is filed by the defendant, who appeared in the action, a finding by the court that the allegations of the cross-petition are true concludes the defendant upon that point, and he will not be allowed to relitigate the question of his assumption of the debt, upon a motion being made for a deficiency judgment.
2. **Deficiency Judgment: APPEARANCE: JURISDICTION.** A general prayer for equitable relief in a petition for the foreclosure of a mortgage, followed by a motion for a deficiency judgment, notice thereof to the defendant and his appearance to contest the same confer jurisdiction upon the court to render a deficiency judgment.

APPEAL from the district court for Douglas county:
CHARLES T. DICKINSON, JUDGE. *Affirmed.*

J. W. Eller and E. J. Clements, for appellant.

J. H. Van Dusen, contra.

LETTON, C.

This is an appeal from a judgment of the district court for Douglas county upon a deficiency arising upon the foreclosure of a mortgage. The main action, under the title of *Smith v. Allen*, was appealed to this court and the judgment therein affirmed (63 Neb. 74). The controversy in the case at bar is between the cross-petitioner, Van Sant, and the defendant, James A. Ollis, Jr. In the foreclosure case the cross-petition of Van Sant contained the following allegation: "That on the 6th day of January, 1894, said defendants Dora Pertz and August Pertz, her husband, sold and conveyed said mortgaged premises to the defendant, James A. Ollis, Jr., and that said James A. Ollis, Jr., assumed and agreed to pay said note and mortgage to this cross-petitioner as part of the purchase price of said premises, and that said defendant James A. Ollis, Jr., further, upon the back of said notes, as shown in the exhibits hereto attached, guaranteed the payment of the same." Defendant Ollis failed to plead to this cross-petition. A trial was had, which resulted in a finding and decree for the plaintiff and for the cross-petitioner, according to the prayers of their respective petitions.

Upon appeal to this court, the decree in favor of the cross-petitioner Van Sant was affirmed, but the decree in favor of the plaintiff was reversed and the cause remanded for further proceedings. Upon a second hearing in the district court, the plaintiff, Smith, recovered another decree, under which the premises were sold, and the proceeds being insufficient to satisfy the first mortgage, the cross-petitioner, Van Sant, filed his motion in the

district court for Douglas county, praying for a deficiency judgment against the defendant Ollis. The defendant Ollis answered the motion, denying that he assumed and agreed to pay the mortgage debt, and alleging that the court had no jurisdiction to render a deficiency judgment. Upon a hearing, the motion was sustained and judgment rendered against Ollis for the amount of the deficiency, from which judgment this appeal is taken.

The defendant's first contention is that there is no evidence to support the judgment. If the facts which determined the liability of the defendant to a judgment for a deficiency were ascertained and adjudicated upon the original decree in the foreclosure case, it is now too late for him to seek a re-examination of this question. This court has been very liberal in its holdings in regard to the right of parties to litigate the question of liability for a deficiency at any stage of the proceedings. But it has uniformly held that, where this issue has been determined in the original decree the parties will not be allowed to open up the same and relitigate the question upon a motion for a deficiency judgment. In the former opinion in this case the court held that Ollis had appeared in the case and said, "As regards the cross-petitioner, Van Sant, the defendants, having failed to plead to his cross-petition, will not now be heard to say that any of the allegations therein contained are not established by the evidence."

The cross-petition alleged that the defendant Ollis assumed and agreed to pay the mortgage debt as part of the purchase price of the premises. Part of the decree relating to the cross-petition is as follows: "The court further finds that there is due to the cross-petitioner William B. Van Sant upon the note set forth in the cross-petition, which said mortgage was given to secure the sum of \$652.80 with interest thereon at the rate of 8 per cent. per annum from May 2d, 1898, which amount is a second lien on said real estate, and that said cross-petitioner is entitled to a foreclosure of said mortgage as prayed in his said cross-petition, and that the allegations in said cross-

petition are true." While this finding is general in its terms, it certainly is a finding upon the statement of the petition that the defendant assumed and agreed to pay the note and mortgage, so that the question upon which his liability to the deficiency judgment depends has been conclusively settled against him by the former decree and cannot be relitigated upon a motion for deficiency judgment. *Kloke v. Gardels*, 52 Neb. 117.

As to the contention that the district court had no jurisdiction to render a deficiency judgment, it seems that this is based upon the proposition that the prayer of the cross-petition is not sufficient to justify the rendition of such a judgment against the defendant. The prayer was a general prayer for equitable relief. In *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, in which there was only a prayer for general equitable relief, as in this case, it was held that this was sufficient to justify the rendition of the deficiency judgment. See, also, *Kelley v. Wehn*, 63 Neb. 410. The decree upon the cross-petition conclusively determined the facts as to the defendant's liability which were alleged by the petition, and the defendant is concluded thereby as to these facts. After these facts had been determined, the cross-petitioner filed his motion, to which the defendant appeared and answered. The court then had jurisdiction to hear and determine the matter of the motion, and since the former decree had found the facts upon which the defendant was liable, and no valid defense was made, it rightly rendered judgment against the defendant for the deficiency.

For these reasons, we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NELSON MORRIS ET AL., APPELLANTS, V. WASHINGTON
COUNTY ET AL., APPELLEES.

FILED JUNE 9, 1904. No. 13,636.

1. **Drainage.** Where a ditch constructed jointly by two counties has proved insufficient to drain properly the lands it was intended to benefit, the county board of one of the counties has the power to adopt a new system of drains of which the old ditch, straightened, widened, altered or deepened, shall form a part, and assess the cost of location and construction upon the lands benefited, upon the proper proceedings for that purpose being taken; and the fact that prior to the adoption of the new scheme of drainage it had failed to clean out the old ditch for several years is immaterial.
2. **Powers of County Board: CONSTITUTIONAL LAW.** The provisions of the drainage law, sections 1-28, article I, chapter 89, Compiled Statutes, confer power upon the county board to provide means for raising a fund from which to compensate landowners whose property has been taken or damaged in the construction of the proposed improvement, and its provisions do not violate section 21, article I of the constitution, providing that the property of no person shall be taken or damaged for public use without just compensation therefor.

APPEAL from the district court for Washington county:
CHARLES T. DICKINSON, JUDGE. *Affirmed.*

E. J. Jackson, for appellants.

Walton & Mummert, contra.

LETTON, C.

In 1883 the county board of Washington county, acting in conjunction with the county board of Burt county, caused to be constructed a drain or ditch from a point in the county of Burt, in a south and southeasterly direction through the county of Washington, to an intersection with a natural water course known as Fish creek. Fish creek at that time emptied into the Missouri river, a short distance below the city of Blair. The ditch as

originally dug had several lateral or spur ditches connecting with it for the purpose of draining the lands lying to the westward of the main ditch, the spur or lateral which is considered in this case being known as York creek spur ditch or spur ditch numbers 10 and 11. The ditch as originally constructed was from 8 to 12 feet wide at the top, about 6 feet wide at the bottom and from 6 to 8 feet deep. The land lying to the west of the ditch is high and rolling, while the land through which the ditch passes and through which Fish creek ran from the intersection of the ditch to where it emptied into the Missouri river is low and flat, and in many places stagnant water, in times of heavy rains, accumulates thereon. For a number of years after its construction, the main and spur ditches were cleaned out within the county of Washington by that county, the evidence showing that four years ago the witness George Sutherland was paid \$700 by the county for cleaning out spur ditch number 11. The creeks and water courses running from the westward toward the line of the ditch have a fall of 12 or 14 feet to the mile, and, in times of heavy rains, water is discharged into the lower country where the ditch lies with great force and rapidity. From the point where the water strikes the low lands to the Missouri river, a distance of about 8 or 9 miles, the land is almost level and the fall is only from 12 to 16 inches to the mile. The original ditch and spur ditches not being of sufficient capacity to carry off and discharge the flood waters flowing from the west, as a natural consequence, when these waters, heavily charged with silt and alluvium, spread out upon the lower land and their flow was checked, the solid matter held in suspension settled, and a deposit of alluvium has been made extending for about a half mile east of the bluffs and for 5 or 6 miles north and south, to the depth of about from 2 to 4 feet above the original surface. The main and spur ditches became so filled with this deposit that the waters flow in a meandering channel partly upon the line of the old ditches and partly outside, their course depending upon

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the nature and amount of the obstruction in the ditches. The bed of Fish creek below the point of intersection of the ditch became largely filled with the accumulation of matter brought down from above, so that it became shallow and did not afford sufficient drainage capacity for the waters flowing into it.

In March, 1903, a petition was filed with the board of supervisors of Washington county under the provisions of the drainage law, being sections 1-28, article I, chapter 89, Compiled Statutes (Annotated Statutes, 5500-5527). This petition was signed by W. G. Howell and others. It set forth that the petitioners were the owners of lots and lands which will be benefited by the ditch, drain and improvement prayed for, and prayed the board to cause "the present Fish creek ditch situated in Washington county, Nebraska, and commonly known as the Fish creek ditch improvement, to be straightened, widened, altered and deepened as follows from (here describing courses and distances). Also that spur ditches numbers 10 and 11 be straightened, widened, altered, and deepened from (describing courses and distances). Also that the board cause to be located and constructed a new ditch commencing at the termination of the present Fish creek ditch and running thence in a south and southeasterly direction (describing courses and distances) to the Missouri river." The petition further sets forth the necessity for such improvements. A bond was filed with the petition according to law. The county board made an actual view of the line of the ditch, made some minor changes regarding its location and dimensions, made the necessary findings that it was conducive to the public health, convenience and welfare, and employed an engineer to survey, level and stake the ditch and to make the report, profile and plat and return the schedule provided for by law. The apportionment made by the engineer was adopted and approved by the board except as to one small item. Following the filing of the engineer's report, the county clerk fixed the 17th day of October, 1903, at

the county clerk's office in Blair, Nebraska, as the time and place for the hearing of the same, and personal notice to resident landholders and notice by publication to non-residents was given as the statute provides. The board met at the time and place fixed in the notice and proceeded to hear objections to the reports and claims for compensation and made findings and adjudications as to all such matters.

After this had been done the plaintiffs, Nelson Morris and John H. Cameron, for themselves and on behalf of all other persons similarly situated, brought this action for the purpose of enjoining the county of Washington and the board of supervisors of said county from making any contract for the construction of the ditch, from determining at what time and in what number of assessments they would require the plaintiff to pay the sums charged against their land, from ordering that such assessments be placed upon the tax books against said lands, from going upon or authorizing any person to go upon the plaintiffs' land for any purpose, except to move obstructions from the ditches heretofore constructed, and asking that the proceedings of the board of supervisors be adjudged and determined null and void. A number of reasons are alleged why the proceedings are void and of no effect, but in the briefs and at the hearing before the court two grounds are mainly relied upon. First, it is urged that where it appears that a county has failed to perform its duty and keep existing ditches, constructed under the provisions of sections 24, 25 and 26 of the act, free from dirt and debris, no power is conferred upon the county board to assess the cost of cleaning out such ditches or keeping them free from obstructions under the guise of straightening, widening, altering or deepening them. The correctness of this contention is so clear that the proposition requires no argument to support it. If the evidence showed that the original Fish creek ditch, which was a ditch in two counties, was of sufficient capacity to perform the duty for which it had originally

been constructed, provided it had been kept cleaned out, then, certainly, the county board would have no authority to charge the duty of cleaning it upon the abutting owners, under the pretext of straightening, widening, altering or deepening it. We are satisfied, however, from the testimony in this case, that the evil which it was sought to remedy actually exists, and that the inadequate provisions made by the construction of the first ditch have failed to afford the necessary relief. By the report of the engineer, which has been adopted by the board, it would seem that instead of a ditch from 8 to 12 feet wide at the top, 6 feet wide at the bottom, 6 to 8 feet deep, as the original ditch was, being sufficient to properly drain the territory sought to be benefited it will require such a ditch as proposed, which will be at the point of commencement, 31 feet wide at the top, 16 feet wide at the bottom and 8.13 feet deep, and is to be gradually widened and deepened until it shall be 35 feet wide from the junction of spur ditch number 11, until it reaches the Missouri river, and be 12.58 feet deep at the Missouri river, and that Fish creek itself shall be straightened, deepened and widened from the end of the original Fish creek ditch throughout its course from that point to the Missouri river and be made to empty into the river at a new place. This contemplates a vastly different enterprise from the mere cleaning out of the old ditches, and, from the testimony as to the conditions, it seems clear that nothing less than a work of similar magnitude would be of any avail to carry off the floods of water which descend during heavy rains in that locality. We are of the opinion, therefore, that this objection is not tenable and that the county board were acting in strict good faith when they adopted the improvement, and did not do so merely as a pretext in order to clean out the old ditches at the expense of the adjoining landowners.

The next objections urged are that, assuming that the act is valid, it confers no authority to exercise the power

of eminent domain, because it makes no provisions for raising money by taxation or otherwise, to pay for lands taken or damaged, and that no provision has been made for such payment in the proceedings sought to be enjoined. And, further, it is urged that the act is unconstitutional because it purports to exercise the power of eminent domain, and makes no provisions for the payment of property taken or damaged.

The constitutionality of the act as a whole has been attacked in this court at least twice, and has successfully withstood the assault. *Darst v. Griffin*, 31 Neb. 668; *County of Dodge v. Acom*, 61 Neb. 376. In neither of these cases, however, was the precise point raised in this case argued or considered by the court, hence it will be necessary for us to consider whether the proceedings which are attacked are void or whether the act itself is vulnerable to the objection of unconstitutionality, for the reasons assigned by the plaintiffs in error.

It is argued that under the law, if the county board find for the proposed improvement, they shall cause the engineer to make a return and schedule of the lots and lands that will be benefited and an apportionment of the number of lineal feet and cubic yards to each tract of land, and so forth, according to the benefits which will result to each from the proposed improvement, and an estimate of the cost of location and construction to each and a specification of the manner in which the improvement shall be made and completed, but that this report and estimate takes no account of compensation for land taken or damaged. It is said that the engineer does not take into consideration compensation to the landowners. By sections 12 and 13, persons whose lands are taken or affected may file their claim for damages and the commissioners on actual view shall fix and allow such compensation and damages as may accrue. But it is urged that no method is provided for paying such compensation or damages in any manner whatever, and that in this case the land of the plaintiff Cameron is taken without

any provisions for compensation and no authority of law to make provision for compensation.

It is the settled doctrine of this court that the just compensation required by section 21, article I of the constitution, to be made for taking or damaging private property for public use must, before such taking, be ascertained and payment made; either by the appropriation of money from the proper fund for such purpose, or by a levy of sufficient taxes to pay the damages, upon which a warrant may be drawn. Until the compensation of the landowner has been made sure and certain, he may not be compelled to give up his property, and the public use of the same may be enjoined. *Zimmerman v. County of Kearney*, 33 Neb. 620; *Livingston v. Johnson County*, 42 Neb. 277. If in the course of the procedure provided for by the statute, the time has not arrived by which the provision for the payment of compensation is to be made by the county board, and in the act there is to be found a means whereby a fund is to be created for that purpose, the plaintiff cannot at this time maintain this action, for it will be presumed that the county officers charged with the duty of assessing taxes for his benefit will proceed at the proper time to do so, and until it becomes impossible he will not be heard to complain. But if in the act there is no provision made for a fund from which to pay the damages which he has suffered, then the whole proceedings must fail, and they may be attacked at any stage.

It is evident from an inspection of the act as a whole, that it was provided by the legislature that all persons whose property would be taken or damaged by the proposed improvement shall have notice of that fact, and shall have an opportunity to have a hearing upon the question of the amount of their damages.

Section 13 provides that the commissioners, on actual view of the premises, shall fix and allow such compensation for land appropriated, and assess such damages as will in their judgment accrue from the construction of the improvement, to each person or corporation making

application as provided in section 12, and, without such application, to each idiot, insane person or minor owning lands taken or affected by such improvement.

Section 14 provides that exceptions may be filed to the apportionment, or to any claim for compensation or damages, and for the hearing of testimony, and power is given to compel the attendance of witnesses. In other sections an appeal to the district court is allowed from any final order or judgment in these proceedings, and provision is made that no appeal shall affect the progress of the construction of the proposed improvement, provided the petitioners shall enter into a good and sufficient bond, to be approved by the clerk of the district court or the judge thereof, conditioned for the payment of all damages and costs that the appellant may sustain on the trial of the appeal. It is provided that the clerk of the district court shall certify to the board of county commissioners a full and complete transcript of the proceedings had upon such appeal in the district court.

Section 18 provides that immediately after the transcript is returned to the county clerk, or immediately upon the filing of the bond mentioned, or in case there is no appeal, then immediately after the hearing of the report of the engineer, the commissioners shall advertise for bids for the construction of the work, which bid shall not exceed the estimated cost.

Section 21 is as follows: "When the working sections are let, as hereinbefore provided, and the cost and expenses of location and construction, and all compensation and damages are ascertained, the commissioners shall meet and determine at what time and in what number of assessments they will require the same to be paid, and order that the assessments as made by them be placed on the duplicate tax list against the lots and lands so assessed."

Section 22 provides for an order to the county clerk to make and furnish to the treasurer a tax duplicate with the assessment arranged thereon as required by their order,

and provides that the unpaid assessment shall be a perpetual lien on the premises assessed and for the collection of the same in the usual manner by the county treasurer.

From a consideration of these provisions, it appears that the county commissioners have no power to enter into a contract for the construction of the proposed improvement until after the allowance of damages or compensation to the landowner, and the final determination by the district court of any appeal from the decision of the county board upon the same, unless the petitioners for the improvement have filed a good and sufficient bond with the clerk of the district court for the payment of all damages and costs that the appellant may sustain, when, it is provided, the work of construction may proceed. After the contract has been let, and after the determination of the amount of damages which have been suffered by landowners, the whole amount of the cost of the proposed improvement is known to the county board, save for the contingency that the amount of damages adjudged to be paid may be changed upon appeal. Up to this time it would have been impossible for them to make an assessment for the costs of the improvement, since only one of the two necessary factors would have been within their knowledge. Then, and not until then, could they act intelligently, and the law, recognizing this, provides, in section 21, that after these matters are ascertained the commissioners shall meet and determine at what time and in what number of assessments they shall require the same to be paid, and shall order that the assessments as made by them be placed on the tax list against the lots and lands assessed.

It is argued by the plaintiffs in error that the statute does not confer power to impose a tax, that in all probability one or more sections were omitted in the preparation and passage of this act, and that the drainage statutes of a number of other states provide absolutely and specifically for compensation for land taken and the assessment and levy of a tax for that purpose. The law

under consideration, while it does not say in so many words that the commissioners shall make an assessment, requires them, after the cost of location, construction, compensation and damages have been ascertained, to meet to determine at what time and in what number of assessments they will require the same to be paid, and that they shall order that the assessments as made by them be placed on the tax list. When the proportionate benefit to each tract has been ascertained, when the commissioners know the total amount of money which it is necessary to raise, when they have determined the number of assessments in which this sum of money is required to be paid, and the times of payment, and when they order these assessments to be placed upon the tax list, what is there lacking of a complete assessment? In Black's Legal Dictionary, assessment is defined as follows:

"Assessment, in a general sense, denotes the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received. Assessment in taxation: The listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to benefit received. Also determining the share of a tax to be paid by each of many persons; or apportioning the entire tax to be levied among the different taxable persons, establishing the proportion due from each."

When a tax-levying officer knows the proportionate benefit to each tract, the amount of money necessary to be raised for a special improvement, and when he has determined the number of payments in which it shall be paid and the time of payment of the same, and has ordered these determinations placed upon the tax list for collection by the proper officers, he has made an assessment. When these acts are performed, the assessment is made and the fact that the statute provides in detail that the commissioners shall do the several acts which constitute an assessment is no less effectual than if it had stated in

general terms that the board should make an assessment and then had specified the manner of procedure.

It may be objected that the landowner has not had an opportunity to be heard upon the question as to whether his land has been specially benefited to the extent of the amount necessary to be levied to compensate the landowner for land taken or damaged. But the statute (section 8) provides that after the engineer has made his report to the county board, in which report he is required to make "an apportionment of a number of lineal feet and cubic yards to each lot, tract of land, road, or railroad, according to the benefits which will result to each from the improvement, and an estimate of the cost of location and construction to each," the county clerk shall fix a day for the hearing of the same and shall give a notice which shall set forth a tabular statement of the apportionment as made by the engineer in his report, and that, *before* the day set for hearing, all persons whose lands are taken or affected shall make application for compensation or damages. These provisions enable each landowner, on the day set for hearing of the report, to know just what proportionate amount the engineer has found that his land has been benefited by the proposed improvement, and also to know what is the total amount of compensation for lands taken, or damaged, claimed by landowners along the line of the ditch. When he knows these two facts he is apprised of the utmost amount to which his land may become liable to be assessed, and he has the right to be heard upon the making of such assessment before the board at the hearing. It is evident that the amount of damages allowed as compensation to landowners must be apportioned by the county board upon the land affected according to benefits, and in the same ratio as to the amount levied upon each particular tract of land, as the apportionment of lineal feet and cubic yards, and the cost of location and construction are apportioned.

Before the report is finally confirmed by the board, all parties have had an opportunity to be heard upon all

questions affecting their interests, and at the time of hearing they have full and adequate information in regard to the estimated cost of construction and location and the entire amount claimed as compensation for land taken or damaged. No further hearing is necessary during the further course of the proceedings, since all questions in which the landowner is interested may be passed upon at this time. The landowner therefore has had his day in court and his property is not taken without due process of law. The compensation and damages are apportioned as to benefits and upon the same basis as the cost of construction and location.

It is objected that the damages allowed may be largely increased upon appeal to the district court and that no means have been provided whereby the increased compensation may be provided. But the commissioners are not required to make the assessment until the final judgment in the district court has been certified to the county clerk. By section 16, however, it is provided that the work shall not be delayed if the petitioners shall give a bond, conditioned for the payment of all damages and costs that the appellant may sustain. But it is said that the landowner should not be compelled to look for his compensation to the uncertainties of a suit upon a bond of a private citizen. To this we assent. The county is the party that is primarily responsible to the landowner for the damages which he has sustained. It has made a special assessment by which to raise a fund out of which he is to be paid. He is entitled to look to the county for his compensation. The county, however, may look to the petitioners, and their sureties under the conditions of their bond, to pay all damages and costs that the court may find the landowner entitled to, above the amount of the original allowance which has been assessed against the property specially benefited. While this manner of providing for the contingency of the damages being increased upon appeal may seem somewhat clumsy, it is the county alone that may suffer from being compelled to

bring an action upon the bond. The landowner cannot complain in this regard, since his right to recover is not from the petitioners but from the county. The provisions of sections 21 and 22 providing for the means of compensation and furnishing the method of determining the amount of each assessment, the time it shall be paid, and the method of collection, are sufficient to accomplish the desired end, when taken in connection with the apportionment according to benefits to each particular lot or tract of land reported by the engineer and confirmed by the board.

In this action the question of whether or not there were irregularities or errors of judgment in the proceedings of the county board cannot be inquired into. It is an original action based upon the idea that the board had no jurisdiction to act. Since we have come to the conclusion that the objections to the jurisdiction of the board urged by the plaintiff in error are not well taken, the judgment of the district court was right and should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. JOHN
FICKENSCHER.

FILED JUNE 9, 1904. No. 11,939.

Evidence examined, and *held* not sufficient to support the verdict and judgment.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin, Edson Rich, E. A. Cook and John M. Ellingsworth, for plaintiff in error.

Warrington & Stewart, George W. Thomas and H. M. Sinclair, *contra.*

DAY, C.

This action was brought by John Fickenscher in the district court for Dawson county against the Union Pacific Railroad Company to recover damages sustained by him on account of having been burned in a prairie fire, which he alleged in his petition was started through the negligence of the railroad company. Upon the trial the plaintiff recovered a judgment for \$1,175, to review which, the defendant has brought error to this court.

It was contended upon the part of the defendant that the fire which it was alleged to have negligently set out never reached the point where the injury occurred, and that the fire which burned the plaintiff, was a fire which originated from unknown causes, and was driven down from the northwest by a heavy gale which was blowing from that direction at the time of the injury. The petition in error contains 63 assignments of error, but, in the view we have taken of the evidence, it seems unnecessary to consider any of the assignments of error except those relating to the sufficiency of the evidence to sustain the verdict and judgment. For the purpose of

The record shows that about noon on April 16, 1899, a fire was discovered along defendant's right of way soon after a train on defendant's railroad had passed, going west. The fire started in section 27, township 12, range 26, near the town of Vroman, and during the afternoon and evening burned in a northwesterly direction and by dark it had reached Fosberg's place some seven miles north and a mile and a half west of the point where it started. During the afternoon and evening a light wind was blowing slightly west of north. The country over which the fire spread, and, in fact, all of the country in that vicinity north of the railroad, is a rough sand-hill country, sparsely covered with grass. The testimony shows that about dark on the evening of the 16th, the fire had reached the south line of land owned by one Fosberg, to wit, the southwest $\frac{1}{4}$ of section 22, township 13, range 26, and that the neighbors living to the north and northwest of his place came to his house to assist in fighting the fire, and among those who came were the plaintiff, his father and brother. These parties started in at Fosberg's and plowed a furrow and back-fired along the east side of a road running from Fosberg's in a southerly direction to one Ditto, residing on the northeast $\frac{1}{4}$ of section 8, township 12, range 26. The testimony of all the parties is clear that this fire did not spread west of the road above described, or north of the south line of Fosberg's, except as indicated by the line representing the outline of the fire and not material to this discussion, as it is conceded that this branch of the fire did not reach the point where the injury occurred. Fosberg and his neighbors who were fighting the fire turned out of the road a short distance north of the Ditto place and changed their course to a southeasterly direction, and continued to fight the fire, keeping upon the west line of it until they reached a point somewhere near the center of section 16, in a pasture known as Larson's pasture. At about three o'clock in the morning several members of the party made an observation from the top of one of the hills near the

center of the section, and all of them say that the reflection of fire could be seen to the west and southwest of them, but none of them were able to place the distance of the fire with any accuracy. About that time the wind began to change, and in a very short time a heavy wind was blowing from the northwest. The Fosberg party then abandoned the fight and started north along the road leading from Ditto's to Fosberg's. The testimony is not clear as to the exact time they reached Fosberg's, but it was somewhere near four o'clock; all agree, however, that a terrific gale was blowing from the northwest. The plaintiff, his father and brother, left Fosberg's at his southwest corner and continued northward toward their home in section 4, township 13, range 26. At that time the reflection of a fire to the northwest could be plainly seen, and some of the party urged the plaintiff not to attempt to go forward. After going some sixty rods north of Fosberg's corner, a fire from the northwest swept down upon them, and the plaintiff, his father and brother, were more or less burned and injured. The testimony also shows that parties who were interested in Larson's pasture were also fighting the fire during the afternoon and evening from a point about the middle of section 16 and along the southeast line thereof toward the railroad track, and that the fire did not pass west of the east line of sections 16, 21 and 28. There is some testimony, however, that in the middle of the afternoon a line of the fire had spread through the hills along the north side of section 16, and that it had spread into section 17, but the testimony shows that this fire was put out. The neighbors who live immediately to the west of the Ditto-Fosberg road are positive that the fire which was burning in the afternoon southeast of Pettit's was put out.

The theory of the plaintiff was that the fire had crept around and through the sand hills along the north side of sections 16 and 17, and thence through the north side of Beatty's pasture until it reached a point nearly north of Brady Island; that it then spread northeasterly until it

reached a point northwest of the place where the injury occurred, and that, when the wind changed to the northwest, this branch fire was driven back upon the plaintiff and injured him. In support of this theory the plaintiff relies solely upon the testimony of witnesses residing from three to four miles south of Brady Island, and who viewed the fire during the afternoon and evening from that distance south of Brady Island. Some of the witnesses say they watched the fire all afternoon, saw it gradually spread west until late in the evening it appeared to be going north, directly north of George's pasture, which adjoins Brady Island on the east. None of them, however, pretend to trace the fire but a short distance north of Brady Island.

It seems a striking fact that none of the neighbors living in the vicinity of where the fire is supposed to have burned saw it or even the reflection of it. Granting that the fire was burning north of Brady Island late in the evening, it does not seem to us that that fact alone would be sufficient to go to the jury that it was the cause of an injury occurring six hours thereafter and six miles distant. It is a fact within the common observation of men, that the location of a fire is but a mere conjecture when the reflection of it on the sky is the only known fact to determine its location. Even when the fire itself can be seen, its location is very deceptive. Taking this whole evidence it seems to us that the verdict of the jury is founded upon a mere conjecture.

The testimony is clear that soon after three o'clock the wind changed to the northwest and blew a gale, some of the witnesses placing its velocity at upwards of thirty miles an hour. The testimony is also undisputed that for several days prior to the injury, a fire had been seen a long distance to the northwest of the place of the injury, and that it was driven down over the country in that vicinity is shown beyond any doubt.

The plaintiff contends that it could not have been the northwest fire which did the injury, because that fire did

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not reach that locality until some time after the injury, possibly an hour. To establish this fact, the plaintiff shows that the fire from the northwest did not reach his home or Kratzenstein's place until an hour or more after the injury. This fact, however, is far from showing that it was not the northwest fire which did the injury or that it was the branch fire from the Vroman fire which did. It is also a matter of common experience that in a prairie fire that a part of it, known as the head fire, travels much faster than the side fire, and if it was the head fire which caught the plaintiff, it is not at all improbable that the side fire might not have spread to Kratzenstein's and to plaintiff's place for an hour or more after the head fire had passed.

The rule of law requires of the plaintiff that he make out his case by a fair preponderance of the evidence, and the evidence must relate to facts which establish with reasonable certainty the plaintiff's cause of action; and while it is for the jury, and not for the court to pass upon the weight to be given the evidence, it does not seem to us that the rule should be carried to the extent of allowing a verdict to stand, based upon evidence which at best is a mere conjecture. The plaintiff's theory of the case is possibly the correct one, but, if so, he is unfortunate in not having witnesses who are able to trace the fire with a reasonable degree of certainty to the place of the injury.

For the reason that the testimony fails to sustain the verdict and judgment, we recommend that the judgment should be reversed and the cause remanded for further proceedings.

HASTINGS, C., concurs.

DUFFIE, C., concurring.

It is practically conceded that a fire was started by a Union Pacific train Sunday the 16th of April, 1899, between the stations of Vroman and Brady Island. The wind was blowing from the southeast and this fire worked its way in a northwesterly direction into the sand hills.

The plaintiff below claims that there were two branches of this fire, one running in a more westerly direction than the other, and that this westerly branch worked its way west and north until it reached a point some distance west of Brady Island and north of that point several miles, until a change in the wind which occurred about two or three o'clock Monday morning, when it was driven back in a southeasterly direction and caught the plaintiff who was on his way home from a point some four or five miles northeast of Brady Island, where he and his neighbors had been fighting what the plaintiff claims to have been the east branch of the fire. The theory of the defendant below is that the fire never got as far west as Brady Island and no further west than to the point where plaintiff below and his neighbors were fighting it. There was a fire started many miles northwest of the place where the plaintiff was injured and had been burning all day Sunday. The wind, when it changed from the southeast to the northwest Monday morning, commenced to blow with great violence, some of the witnesses placing the velocity at from thirty to sixty miles an hour. This wind undoubtedly brought down the fire which had started a day or two previously in the northwest, and the controverted question was, did this fire do the injury complained of or was it a branch from the fire set by the engine of the railroad company which had worked west and north until a change in the wind from the southeast to the northwest brought it back in a southeasterly direction to the place where the injury occurred. There is some evidence to support the verdict of the jury. Most of this evidence comes from parties living south of the Platte river and four miles or more south of Brady Island, who testify that they saw the fire about the time that it started along the right of way of the railroad company and watched it at different times during the afternoon and evening of Sunday. These witnesses testify that the fire had worked its way west and north of Brady Island. If this be true, the course of the fire from the burnt ground

that it passed over, must have been clearly distinguishable and yet parties living in the vicinity where the fire is claimed to have passed, testify that the grass was unburned Monday morning, and parties from the north who had occasion to visit Brady Island Monday morning, are very positive in their testimony that the grass between what is called the east line of the fire and Brady Island was wholly unburned. It seems to me that the positive evidence of those living in the vicinity and others who had occasion to pass over the section of country where the fire is claimed to have run, that the grass was wholly unburned, that no trace of the fire existed, ought to be accepted as conclusive upon that question, and conclusive upon the fact that it was the fire which originally started in the northwest that was the cause of the injury.

The opinion of Judge DAY upon this branch of the case is so conclusive that I think it ought to stand.

By the Court: This case has been several times argued, and there being some difference of opinion among the commissioners who heard the several arguments, it was heard again by the court. With the assistance of able counsel for both parties, we have examined the entire record and conclude that the foregoing opinions of Mr. Commissioner DAY and Mr. Commissioner DUFFIE show the true condition of the evidence.

For the reasons there given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SARAH J. RICHARDS V. MAXEY H. HASKINS.

FILED JUNE 9, 1904. No. 13,463.

Adverse Possession: ABANDONMENT. One holding adverse possession of land which he has inclosed, does not abandon such possession by his failure to have it occupied by a tenant or otherwise for a reasonable space of time, no other person making claim to the property or taking possession during such nonoccupation, and there being no evidence of any intent on his part to abandon his possession and claim to the land.

ERROR to the district court for Harlan county: Ed L. ADAMS, JUDGE. *Affirmed.*

B. N. Robertson, for plaintiff in error.

D. W. Merrow, *contra.*

DUFFIE, C.

This is an action in ejectment. Plaintiff in error, who was the plaintiff below, claimed title to 160 acres of land in Harlan county. The defendant is in possession as the tenant of Walter G. Clark, who also claims title. It was stipulated in the record that David Whitney and Samuel Bauserman, partners, were the owners of the land in July, 1878. In August of that year these parties filed a petition in bankruptcy in the district court of the United States for the district of Nebraska, which petition was, by order of the court, referred to J. L. Webster, register in bankruptcy. T. W. T. Richards was chosen assignee, and the register thereupon conveyed to him by deed all the property of the said Whitney and Bauserman, as required by the bankrupt law of 1867. The land in question was listed among the assets of the bankrupt. In December, 1878, the trustee petitioned the federal court for leave to sell certain assets of the estate, including the land in suit, at private sale, and this petition was indorsed by the register in bankruptcy and concurred in by the judge of the

federal court. Sometime thereafter said land was sold by the trustee to Burr H. Richards for the sum of \$1,200, subject to the taxes due thereon, and a deed executed and delivered July 24, 1885. In November, 1901, the trustee filed a motion and affidavit in the federal court setting out the fact of a sale of said land, the execution and delivery of the deed, and that the records of the court did not disclose that an order of confirmation had been made by the court, although it was alleged that the trustee supposed and believed that the sale had been confirmed long prior thereto. And thereupon the federal court entered an order confirming said sale. Burr H. Richards departed this life in the city of Baltimore sometime in 1890, and by the terms of his will, the land in controversy was devised to the plaintiff, Sarah J. Richards. The foregoing constitutes the plaintiff's chain of title.

The defendant's chain of title is, first, a tax deed made by the treasurer of Harlan county, Nebraska, to C. C. Flansburg of date December 30, 1882. Flansburg conveyed to Lee A. Adams, December 15, 1883. Adams conveyed to Hugh G. Clark, June 7, 1884, and David Whitney and Samuel Bauserman quitclaimed to Clark, May 13, 1884. Clark died in 1892, and Walter G. Clark is his only heir and administrator of his estate. Adverse possession for more than ten years was the principal defense. The case was heard by the Honorable H. M. Sullivan who took the same under advisement; but prior to a decision of the case, Judge Sullivan resigned, whereupon the parties had the evidence transcribed, and, by agreement, the case was submitted to Judge Adams, on said evidence, who entered a finding and judgment for the defendant, from which the plaintiff has taken error to this court.

In the printed brief of the defendant, as well as in the oral argument on the submission of the case, many exceptions were taken to the regularity of the bankruptcy proceedings through which plaintiff claims title; but as we are of the opinion that the evidence fully supports the claim of adverse possession asserted by the defendant, it

would be a waste of time to discuss the numerous objections made to the proceedings in bankruptcy, and the effect of the trustee's deed to Burr H. Richards.

Relating to the defense of adverse possession, the evidence is quite conclusive that Hugh G. Clark rented the land in question to one Frank Shaffer in 1890. It appears that other owners of land had built fences on the east, south and west lines of the land in dispute sometime prior to the spring of 1891, and that Shaffer, on obtaining a lease from Hugh G. Clark, erected a fence on the north line of the land in the spring of 1891. There is some controversy as to the duration of Shaffer's lease, and as to the time that he actually occupied the land. In September, 1890, Shaffer wrote to Clark desiring to lease the premises for two years, and on November 16, 1890, he wrote Clark to make out a lease for two years at twenty-five dollars a year, and indorsed on this letter in the handwriting of Clark is the following memorandum: "W $\frac{1}{2}$ SW $\frac{1}{4}$ 14—E $\frac{1}{2}$ SE $\frac{1}{4}$ 15-1-17—Harlan Co. 2 years \$25 per year, payable May 1, 1891 and 1892."

Shaffer again wrote Clark, December 1, 1890, requesting Clark to make out a lease for two or three years and send to him at once, and on December 8, 1890, he again wrote, acknowledging receipt of a letter from Clark with a contract in it. In this letter he states that the contract is all right with the exception of one matter which Clark overlooked, which was in relation to Clark's buying, at the end of the lease, any fence that Shaffer might erect upon the land at 50 per cent. of its cost. May 9, 1891, Shaffer wrote to Clark, inclosing \$12.50, one-half of the agreed rent for 1891, promising to remit the balance on November 1. These letters, together with Clark's memorandum on the letter of November 16, 1890, are quite conclusive in connection with Shaffer's oral evidence, that Clark rented the premises to Shaffer for the years 1891 and 1892 at \$25 a year; and the evidence is undisputed that Shaffer held possession during 1891, having, as before stated, built a fence along the north line in the spring

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of that year. In the year 1892, Shaffer went to Colorado, and sold his fence to Gifford & Williams. Whether he sold the unexpired term of his lease is a disputed question, and the evidence relating thereto is quite unsatisfactory. In his testimony Shaffer says:

"In 1892 I was going to quit down there and I brought some of my cattle up in the fall and I left some down there, and during this time I was figuring to sell the fence, and, as I stated, I wrote to Mr. Clark to take the fence, and he said he would prefer not to do it. He said to do the best I could; that he would rather I would sell it, because he was so far away from it; and I figured with somebody else in regard to selling it, and I turned this over to Gifford & Williams in 1892, but whether it was early in the spring or during the summer I couldn't tell you."

By the Court: When did you close up the deal with them about the fence?

A. In 1892.

Q. When did they take the land?

A. In 1892. * * *

By Mr. Merrow: In regard to the rent for the year 1892, state whether or not these men, Gifford and Williams, settled with you for the rent for that year?

A. I think they did—I wouldn't be positive—My best recollection is that they did—I am not positive in regard to that—I think that was included when I sold the fence.

Mr. Williams, whose deposition was taken in Colorado, stated that he occupied the land during the years 1892 and 1893; that he got possession from Frank Shaffer; that his best recollection is that he paid Shaffer the rent for one year, and J. B. Billings & Son for one year. The evidence is undisputed that J. B. Billings & Son took charge of the land at the request of Walter G. Clark in the spring of 1893, and they rented it to Gifford & Williams for the year 1893, and have continued to act as agents for Walter G. Clark from that time up to the date of the commencement of this action. While we are not

entirely satisfied from the evidence that such is the case, our best judgment is that Shaffer, at the time he sold his fence to Gifford & Williams, also turned over the land to them for the unexpired term of his lease; and while it is possible that Shaffer did not put Gifford & Williams in possession of the land for the time his lease still had to run from the date of their purchase of his fence, and that there was a break in the possession of the land by Clark, through his tenants, we do not think that such break in the occupation would work an abandonment of the possession or serve to interrupt the continuity of possession claimed by Clark. Many authorities are to the effect that where one has inclosed land and made improvements thereon that he does not abandon such possession by his failure to have it occupied by a tenant or otherwise for a limited time, no other person claiming or taking possession during such interval.

In *Hughs v. Pickering*, 14 Pa. St. 297, the following was held: "In order to destroy the continuity of possession, the vacancy must not be merely occasional, such as occurs in every case where a party, from some cause, unable to obtain a tenant, shuts up his property for a short time, or, indeed, for a long time." In *Crispen v. Hannavan*, 50 Mo. 536, there were several occasions when no one was actually cultivating the premises, the longest of which was from about 1861 or 1862 to 1865 or 1866. In discussing the charge to the jury as to what would constitute such a break as would destroy the possession, the court say: "It might have been inferred that living off from the premises, a failure to cultivate them for a year or more, for whatever reason, would constitute such a break. Nothing would be more erroneous. While an abandonment of the premises will so break the possession of him who has occupied, that the constructive possession of the true owner will again attach, and thus save his right of entry, every failure to cultivate the field for a season, or a delay in repairing the fences when destroyed, will not be held to be an abandonment if sufficient reason appears."

This court in *Stettinische v. Lamb*, 18 Neb. 619, has said: "Where a party erects a building on a lot, and takes actual possession of the same as his own, the fact that afterwards he, or those claiming under him, rent the property, or in case it is unoccupied, have and claim the right to the possession of the same where there is no abandonment, is not an interruption to the possession. * * * The building at least belongs to the claimant. He may use it in any manner he sees fit; and so long as no one enters into possession thereof claiming adversely to him his possession is not interrupted; and possession being once established in Mrs. Towle by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have continued until an interruption therein is proved." An even stronger case is found in *De La Vega v. Butler*, 47 Tex. 529.

While citing the Texas case as showing to what extent some of the courts have gone, we do not wish to be understood as wholly approving the rule therein announced. We believe the true rule to be that an absolute abandonment by the claimant, however long his possession may have continued, and however great the improvements made by him, has the effect to vest in the true owner of the title constructive possession of the premises, and that the rule announced by this court in *Stettinische v. Lamb*, *supra*, is the rule which should prevail. Measured by this rule, Clark, who had taken actual possession of these premises by his tenant, in 1891, cannot be held to have abandoned his possession because his tenant may have left the premises before the expiration of the lease; there being no evidence in the record that Clark himself had done anything indicating an intention to disclaim title or to abandon the possession which he had taken through his tenant.

Holding these views, we recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM A. CAMPBELL, RECEIVER, v. NOYES, NORMAN &
COMPANY ET AL.

FILED JUNE 9, 1904. No. 13,556.

1. Decree: INTERPRETATION. A decree wherein a party is directed to pay a specific fund in his hands into court for distribution among claimants thereto, will not be held to be a lien upon the real estate of such party in favor of the claimants unless it is provided by the decree that the claimants recover of the party holding the fund, and that in default of payment execution may issue.
2. ———: ———. Creditors of an insolvent debtor filed a bill against the debtor, joining with him as defendant a bank to whom the debtor was alleged to have made a fraudulent transfer of chattels, the object of the bill being to cancel the mortgage and subject the fund created by the sale of the chattels to their claims. The decree canceled the mortgage and ordered the bank to pay the fund into court. *Held*, that the decree did not constitute a lien on the real estate of the bank.

ERROR to the district court for Johnson county: JOHN
S. STULL, JUDGE. *Reversed*.

L. C. Chapman and George A. Adams, for plaintiff in
error William A. Campbell.

S. P. Davidson and Hugh LaMaster, for Noyes, Nor-
man & Co. et al.

George Adams and Culver & Phillips, for Kemper,
Hundley & McDonald Dry Goods Co. et al.

KIRKPATRICK, C.

This case presents for determination a contest between plaintiff in error, William A. Campbell, receiver of the Chamberlain Banking House and representing its general creditors, and defendants in error, who claim a preferred lien upon certain money in the hands of the receiver realized from the sale of the real estate of the bank, con-

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sisting of the banking house and the lot upon which it is situated. The banking house, hereinafter called the bank, is insolvent, and only a small per cent. of its liabilities can be paid. The trial court awarded defendants in error a preference over the general creditors, and the receiver prosecutes error to this court.

In order that a clear understanding may be had of the questions presented by the record, it will be necessary to give a brief history of the transactions leading up to the entry of the judgment complained of. In the year 1895 Renshaw & Company were engaged in the mercantile business in Crab Orchard, in Johnson county. At that time they were indebted to defendants in error, who are wholesalers, for goods. They were also indebted to the bank in a sum amounting to about \$2,681. On November 6, 1895, Renshaw & Company executed a mortgage to the bank to secure the amount due it, and the bank immediately took possession of the stock of goods, and thereafter advertised the goods and sold them under its mortgage. Soon after the bank obtained its mortgage and took possession of the goods, the various defendants in error commenced actions in the county court of Johnson county against Renshaw & Company, prosecuted them to judgment, procured the issuance of executions, which were returned unsatisfied, and thereafter procured the bank to be garnished. The bank answered in the garnishment proceedings, denying that it was indebted to Renshaw & Company. The defendants in error generally took exceptions to the answer of the bank. None of the judgments obtained by defendants in error in the county court were ever transcribed to the district court. On June 1, 1896, the creditors of Renshaw Company, who had obtained their judgments in the county court, defendants in error herein, united in a creditors' bill asking to have the mortgage which Renshaw & Company had executed to the bank declared fraudulent and void, and to require it to pay the money, which it had realized from the sale of the stock of goods of Renshaw & Company, into court to be

applied in satisfaction of the judgments obtained in the county court. The bank answered, setting up the *bona fides* of its mortgage. Trial was had, and on November 8, 1900, a decree was entered holding that the mortgage in controversy was fraudulent and void, and ordering the bank to pay to the clerk of the court for the benefit of defendants in error, plaintiffs in the creditors' bill suit, the sum of \$3,472.73, being the value of the goods sold by the bank under its mortgage, with interest thereon up to the date of the decree. The bank prosecuted error proceedings from the decree so entered to this court, where the decree was affirmed.

In the meantime the bank had become insolvent, and on September 11, 1902, plaintiff in error was appointed and qualified as receiver, and took possession of all the property of the bank. Thereupon, and on January 23, 1903, defendants in error commenced this proceeding against the bank, asking that they be allowed a preferred claim for the amount which the district court in the decree of November 8, 1900, directed the bank to pay to the clerk of the court for the satisfaction of the county court judgments, upon the ground that the decree of November 8, 1900, was of such a character as to become a lien upon the real estate of the bank, and thus make the claims of defendants in error superior to that of the general creditors.

Plaintiff in error, as receiver, resisted this application, claiming that the decree of November 8, 1900, was not a lien upon the real estate of the bank. The trial court found against the receiver, and adjudged the claims of defendants in error prior liens upon the fund to be applied pro rata upon their several county court judgments. The correctness of this judgment of the trial court is the question presented for determination in this case.

Before the trial of the case, the receiver, by order of the court, sold the real estate of the bank, consisting of the banking house and the lot upon which it stood. Defendants in error objected to the confirmation of the sale, and it was thereupon agreed between all parties that the sale

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should be confirmed and the money retained in the hands of the receiver, pending the final determination of this case.

Defendants in error seem not to attach importance to the fact that garnishment was had upon the bank, further than to contend that the creditors' bill to set aside the mortgage given by Renshaw & Company to the bank was more than a creditors' bill, in that it was in fact a suit against the garnishee because of an unsatisfactory answer. The controlling question in the case, however, seems to be whether the decree of November 8, 1900, is of such a character as to become a lien on the real estate of the bank.

For the purpose of ascertaining the full import of the judgment under consideration, it will be convenient to quote at some length from both the petition of defendants in error and the judgment itself. From the former we will quote the following:

"Wherefore these plaintiffs pray that an account may be taken of the amount due each of said plaintiffs upon its judgment against said F. D. Renshaw & Co., that it may be found, adjudged and decreed that the said plaintiffs and each of them obtain a lien upon the goods of the said F. D. Renshaw & Co., so taken possession of by the said Chamberlain Banking House and the proceeds of said goods; and that said liens are still valid and subsisting and binding upon said goods and the proceeds of the same in the possession of the defendant bank and prior to all other liens thereon; that said chattel mortgage so made to the Chamberlain Banking House be found and decreed to be fraudulent and void as to these plaintiffs and each of them, and that the said mortgage may be canceled and set aside, and out of the proceeds of the sale of said goods the said Chamberlain Banking House may be ordered and decreed to pay to these plaintiffs, or into this court for them, the amount of the respective claims against F. D. Renshaw, and for such other and further relief as may be just and equitable."

From the decree it will only be necessary to quote the following:

"It is, therefore, considered, ordered, adjudged and decreed that the chattel mortgage executed by F. D. Renshaw & Company to the Chamberlain Banking House on the 6th day of November, 1895, to secure the payment of \$2,681.23, be and the same is declared to be absolutely null and void, and that the defendant, the Chamberlain Banking House, pay to the clerk of this court the said sum of \$2,681.23, together with interest at the rate of seven per cent. per annum from the 6th day of November, 1895, being a total sum of \$3,472.73, including interest, and that said sums be distributed pro rata to the several plaintiffs in this action, that is to say," etc.

It will be observed that, in the prayer of their petition, defendants in error sought only to have the chattel mortgage declared to be a nullity, under and by virtue of which the bank should obtain no rights or claim to the goods of the Renshaw Company or any moneys realized from the sale of such goods; and further, to have the goods, or the money realized from the sale thereof by the bank, made available for the satisfaction of their liens and claims against Renshaw & Company. From the judgment, it is clear that the court attempted, and we think, did give them all that they asked; that is to say, the mortgage was nullified and canceled, so that any rights under it conveyed to the bank were abolished; and as the goods were converted into money, the decree directs that the money be paid into the court for distribution among defendants in error.

We have, then, a decree by which a certain instrument is canceled, the result of which presumably creates a fund; and thereupon a direction to the party in whose possession the fund is to pay it over. But there is no recital here that one party shall have and recover of the other a sum certain, and that in default of payment execution shall issue. It does not seem to us that the decree under consideration is one upon which an execution could

have issued against the bank, to be levied, as in the case of an ordinary money judgment, upon any of its property, no more than an order issues to the bank to pay into the court a fund presumably in its hands. The decree clearly adjudicates that the bank has no claim or right to that fund; but we read this decree in vain for any intimation of an intention to render a general money judgment against the bank. We do not think we are now concerned with the question whether the court had jurisdiction to give judgment in favor of defendants in error against the bank for a specific sum of money, in default of payment of which execution should issue. It is sufficient to say that defendants in error neither asked for such relief nor did the court grant it.

In order that defendants in error may now have the relief granted them by the lower court in the case at bar, it ought to be made to appear that the decree under consideration, as that decree stood of record, would charge a prospective purchaser of the real estate of the bank that there was a valid and subsisting judgment against the bank upon which an execution might issue. The view we entertain is that this decree would not constitute such notice. He who inquired would have ascertained that a certain chattel mortgage executed to the bank had been canceled, and that the bank's claim upon the fund created by its assumption of possession and sale of the mortgaged chattels had been adjudicated adversely to the bank, and that it had been directed by the order of the court to pay this fund into court for distribution among certain claimants thereof.

In view of what has been said, it follows that the judgment of the district court, giving to the defendants in error a preference over the other creditors of the bank, is wrong, and ought not to stand. It is therefore recommended that the judgment be reversed and the cause remanded for further proceedings.

LETTON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN TODD, APPELLANT, V. YORK COUNTY ET AL.,
APPELLEES.

FILED JUNE 30, 1904 No. 13,214.

1. **Waters: DRAINAGE.** An owner has the right to protect his land from surface water, and, in the interest of good husbandry, to drain lagoons or basins thereon of a temporary character by discharging such surface waters by means of artificial channels into a natural surface water drain on his own property and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.
2. **Liability for Damages.** An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume and by means of an artificial channel discharge it upon another's land, contrary to the natural course of drainage, to the latter's damage and detriment.

APPEAL from the district court for York county:
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Meeker & Wray, for appellant.

F. C. Power and Charles F. Stroman, contra.

HOLCOMB, C. J.

An injunction was applied for to restrain defendant from diverting surface water onto plaintiff's premises, and, from an order denying the application and dismissing

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the action, the latter appeals. The plaintiff and defendant own adjoining quarter sections of land with a public highway running between. The plaintiff's land lies to the west of the defendant's, the county occupying its land as a "poor farm." A liberal quotation from the decision of the trial court will conduce to a more intelligent understanding of the case and of the legal propositions to be considered. What is there said is fairly reflected by the record. Says the trial court: "North and west of Todd's land a draw has its source which runs diagonally across the northeast corner of his land, crosses the public road and enters the land of the county well to the north side. This draw runs in a southerly direction for more than 60 rods upon the county farm, and then bears to the southwest across the public road, and then runs across the southeast corner of Todd's land, and from thence into Beaver creek, 4 or 5 miles distant. This draw is the natural surface drainage for more than 400 acres of land before it enters the county farm. Its bed is generally crossed in farming the land in and on either side of it. The east half of the county farm is low, and near its center is some basin land upon which the surface water naturally runs from 60 or 70 acres of surrounding land. Between this basin or low land and the draw west of it, there is a rim or ridge which would prevent the water from finding its way into the draw. About twelve years ago the then owner of the county farm dug a ditch or drain from this low land in a westerly direction through the ridge and into the draw, the ditch at its deepest point being about four feet. This ditch enters the draw at a point about 15 rods east of plaintiff's land. The county purchased its farm about three years since and has opened and cleaned the ditch, so that the basin land on the east side of its farm is drained into the draw and thence through plaintiff's farm. None of the water in the basin would find its way into this draw but for the ditch above mentioned. In wet seasons the flow through the draw is appreciably increased and it continues to flow longer than it did before the opening of

the ditch. This action was begun to enjoin the county and its officers from draining its low land into the draw. The plaintiff claims that his land has been injured in value by reason of the construction and maintenance of the ditch. The defendant claims that it has a lawful right to make use of this natural surface drainage for its own benefit. The facts are practically undisputed, and in view of the holding of our supreme court, it is believed that the issue is wholly one of law. It was neither alleged nor proved that the county was negligent in the construction or maintenance of the ditch, and the question for determination is, whether one may conduct surface water into a draw on his own premises and thus increase the flow of the draw to the injury of his neighbor. Whatever may be the rule in other jurisdictions, it is well settled that the proprietor of lands may by a proper use and improvement upon them deflect surface waters; and for consequent damages to his neighbor he is not liable in the absence of negligence." The surface water sought to be deflected in the manner complained of does not constitute a lake, pond or lagoon of a permanent character. In seasons when the precipitation is above normal and in the more rainy periods of the year, water collects therein and so remains for a period of time. In the drier portions of the year, by evaporation and percolation, the water passes off, leaving the land dry as other portions thereof. It is, as we understand the record, not denied but that the means resorted to by the defendant for the purpose of reclaiming the basin or swamp land on its premises and relieving it of the accumulation of surface water which would otherwise collect thereon are the most appropriate and best calculated to accomplish the desired result. While there are allegations in the pleadings tending to raise an issue as to whether the natural drainage is toward the draw and in the direction of the course of the artificial drain, and whether the methods adopted are reasonably well calculated to effectuate with the least possible injury the reclamation of the swamp or basin land, yet the evidence

clearly supports the inference that the improvement as it was undertaken is the practical, most natural, and reasonable plan that could be adopted. No inference of negligence or improper adoption and execution of plans in reclaiming the land sought to be relieved of the surface water collected thereon can be drawn from any of the evidence appearing in the record. It is the contention of counsel for plaintiff that, wholly aside from any question of negligence, it is an actionable wrong for the defendant to collect in the artificial drain constructed by it the waters draining naturally into the basin or low lying land on its own premises and discharge them into the draw running through its own land and thence through such draw on the premises of the defendant. This, it is claimed, is a wrongful invasion of a well established right. Notwithstanding the rule of the common law as to surface water being regarded as the common enemy, say counsel, the doctrine does not extend so far as to permit one landowner to cast surface water in a body upon his neighbor's land and if he does so, he is liable for the injury sustained. The draw or ravine into which the surface water from the basin on the defendant's premises is drained, is not a watercourse in the technical sense of the term. It is, however, unmistakably a natural waterway or channel in which surface water is collected and flows to its mouth, and affords an outlet for all the water naturally draining therein from the surrounding country into Beaver creek, a natural watercourse, where it finds its way some four or five miles distant. The draw in question is a natural surface water channel, not of course having a sustained flow nor any permanent source of supply. It carries to the creek the surface water after each recurring rain or the melting of snow and then becomes dry. It has not a worn channel cut in the soil and its bottom is grown over with grass when not in cultivation. It is one degree removed from natural watercourses according to their technical signification. The defendant's land lies within the territory drained by the draw in question; that is, the

surface water falling thereon naturally finds its way into this draw and thence into the stream into which the draw empties. The part of defendant's land sought to be reclaimed has no natural outlet. It is a basin, and the natural drainage is toward the center thereof. The basin acts as a receptacle for the surface water falling on 60 or 70 acres. If, however, the basin were filled up or if drained of its accumulated water, the natural drainage would be toward and into the draw passing through and over a part of the defendant's land and on and over the land of the plaintiff. Good husbandry is promoted by the reclamation of this waste land and using it for tillage purposes. But for its wet character because of the conformation of the surface, the land would be as useful and valuable as other farm lands in the immediate vicinity. If it is not permissible to drain the waters off and into the draw, and thereby improve the land for agricultural purposes, then defendant must permit the land to lie and remain useless and the water to stand and remain thereon, except as it may pass off by evaporation or percolation. Under facts and circumstances such as narrated, is it an infringement of the rights of the plaintiff by an artificial channel to drain the water from the swamp land of the defendant into the draw passing through its premises and there permit it to flow down and over the defendant's lands? In other words, by adhering to the natural course of drainage may the surface water draining into the draw be increased to the extent necessary to drain the 65 or 70 acres which would otherwise flow into the basin on defendant's land and there remain? It may be conceded that some injury results to the proprietor of the lower estate by reason of the increased flow of surface water thus drawn on his land, and the direct question is whether the law affords him a remedy or whether it is an injury *damnum absque injuria*. Surface water is regarded as the common enemy which every proprietor may fight or get rid of as best he may; and a landowner may expel from his land all mere surface water in draining his soil for

agricultural purposes, and an adjoining landowner will have no right of action by reason of such diversion. Gould, Waters (3d ed.), sec. 265 and authorities cited. The above rule, like all others, has its exceptions and limitations. Another rule well established and related to the first is that a landowner has no right to rid his land of surface water by collecting it in an artificial channel and discharging it upon an adjoining proprietor. To do so would violate elementary principles of justice. The adjoining proprietor's land ought not to be made to bear a burden naturally belonging to the other estate. But it is said a landowner may drain his land by artificial ditches and thereby cause the water to pass more rapidly and with increased volume onto the adjacent land of the lower proprietor if the same water would not naturally flow in a different direction and he acts with the proper regard for his neighbor's welfare. Gould, Waters (3d ed.), sec. 271. From these rules of general application and the prior decisions of this court touching the doctrine of surface waters, has the plaintiff brought himself within the rule and the reason of it and is he entitled to an order perpetually enjoining the defendant from maintaining the artificial ditch constructed for the purpose of reclaiming and utilizing for agricultural purposes the land drained thereby? In *Davis v. Londgreen*, 8 Neb. 43, an early case in this court, it is held that: "The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury." It is apparent from a reading of the opinion in that case that what the court in fact decided was that the surface water on the upper estate could not be collected in an artificial channel and thrown on the land below there to remain, or to cut a channel for itself to some lower level. The principle enunciated may be considered as the accepted common law rule relating to the deflection of surface waters, and is and has been the

doctrine obtaining in this state since its first announcement. The allegation in the petition in that case on which the right to relief was predicated, as disclosed by the opinion, was that the water drained through the artificial channel spreads over and into several acres of cultivated land and renders the same not cultivable and unfit for use; that it had begun to cut a watercourse and that the natural result from such ditch "is to cause all the water accumulating in said pond after each rain, and in the spring season, to flow over, into, and across the said land of plaintiff, thereby rendering the same wholly unfit for tillage, and to cut said watercourse across plaintiff's land of greater depth and width each time said pond is drained." The *Londgreen* case was followed in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138. It is there again held, that a party has no right to collect surface waters in a ditch and permit them to flow on the land of another without the latter's consent. *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90, was in the case last referred to cited and quoted from approvingly wherein it is said by the supreme court of Michigan: "One has a right to ditch and drain and dispose of the surface water upon his land as he sees fit; but he is not authorized to injure, by so doing, the heritage of his neighbor. He cannot collect and concentrate such waters, and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor." In the latter case decided by this court, as in the former, the question for consideration was the throwing of unusual quantities of surface water by means of artificial channels on the lower proprietor's land where it rested or found its way gradually to some lower level. In neither of these two cases was the question here presented, considered or decided. The right to the use of a natural surface waterway or channel in carrying off surface water or to increase its flowage by the drainage through artificial channels of ponds and lagoons of a temporary character did not enter into the consideration of either case, and in each it was very properly decided that

the lower proprietor should be protected from an invasion of a substantial right by throwing unnecessarily and in unusual quantities accumulated surface waters on the lower land to its damage and detriment. The act complained of and the wrong relieved against, was the burdening of the lower estate, and where the relief of one could be accomplished only by the imposition of a like burden on the other. Where there are two estates otherwise equally favorably situated by nature, and one is burdened by an accumulation of surface water in a pond or lake, it is difficult to conceive of any sound principle of justice which would permit the estate so burdened to be relieved by collecting in an artificial ditch such surplus waters, and casting them upon the land of the lower proprietor to his damage and detriment. Each proprietor takes the land as nature has formed it, and one ought not to improve his estate solely at the expense of his more fortunate neighbor. In the case at bar, strictly speaking, the defendant does not collect the accumulated surface water and by means of artificial channels cast it on the land of the lower proprietor. What it does, in fact, is to drain the basin on its own land by an artificial channel into a draw or natural waterway for surface water passing over its land, where the water flows according to the natural course of drainage over the lands of the lower proprietor, thereby increasing the flow of the surface water channel to the extent of surface drainage on 65 or 70 acres of land. It is argued that the natural course of drainage is toward the center of the basin on defendant's land, and therefore it cannot be said that the artificial drainage only expedites the flow of surface water which would otherwise find its way into the draw and onto plaintiff's land. What in fact is done, say counsel, is to divert into a new channel and in a different direction, contrary to the natural course of drainage, the surface waters collected in such basin and that such a drainage of surface waters is opposed to all the rules governing the control and deflection of surface waters. We do not regard the argument as wholly sound.

Of course the drainage is toward the center of the basin. This, however, may be said of thousands of depressions in the surface of land in any specified territory drained in one general direction and into a certain surface water drain. Yet one would not seriously argue that such depressions could not be filled or drained by ditches, and yet the waters therefrom would continue to flow according to the natural course of drainage. The territory immediately surrounding the basin except as modified by the basin itself drains into the draw passing over plaintiff's land. The draw is the natural outlet for the surface water falling in that territory and is the natural outlet for the basin and the land drained into it if it is to have any outlet at all. Treating the basin and the land drained into it as an independent watershed, then counsel's position is right; but viewing the land, as we think should be done, as having a natural drainage into some permanent lake or other similar body of water, or into a regular watercourse by means of surface water channels, the territory in question properly and naturally drains into the draw spoken of and thence into Beaver creek, a natural watercourse. In *Rath v. Zembleman*, 49 Neb. 351, a case decided in 1896 and upon a record presenting an almost identical state of facts as in the case at bar, after reviewing the prior decisions, it is by the court held, "In an action for damages alleged to have been caused by the drainage of surface water from a pond on defendant's land into a draw, by which such water was conducted to and across the land of plaintiff, an admission by plaintiff that the draw was a natural waterway and had, since his ownership of the land claimed to have been damaged, been such a waterway, and that the water generally from that portion of the country had flowed through this ravine, precluded the possibility of a recovery of damages for the destruction of grass in the bed of such draw on his premises caused by the additional flowage resulting from the aforesaid drainage." RYAN, C., writing the opinion of the court, says: "On the trial it was admitted by the plaintiff, in open court, that

the draw through which the water flowed from the defendant's land to and across plaintiff's, was a natural waterway running from Clay county, and that it had been such ever since the plaintiff had occupied his premises, and that the waters from that country were drained through this ravine or draw and ran down through plaintiff's land. In view of the holdings of this court since the trial of this case, announced in *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526; *City of Beatrice v. Leary*, 45 Neb. 149, and *Jacobson v. Van Boening*, 48 Neb. 80, the plaintiff in no event could have recovered damages in the face of his admissions as to the flowage and the character of the waterway which it followed." The principles underlying the decision in the case cited and in the one at bar are almost if not quite the same. In fact the two cases cannot well be distinguished. If the injury to the hay in the draw because of the drainage therein of surface water by means of ditches afforded no ground of recovery, then the increased flowage in the case at bar, by reason of the drainage of the basin, cannot justify an injunction against its further continuance. We can hardly escape the conclusion that the *Rath-Zembleman* case must necessarily govern us in the disposition of the one at bar unless it may be said that the case ought not to be followed. The decision is based expressly upon the authority of the prior holdings in this jurisdiction. An examination of these several decisions warrants the conclusion that in this jurisdiction the rule is, the drainage of mere surface water collected from rains and melting snows in lagoons or basins, when done without negligence, and for the purpose of reclaiming what would otherwise be waste land, in the interest of good husbandry, by an artificial channel and according to the natural course of drainage, may be accomplished by diverting such waters into a natural surface waterway or channel on the owner's land where it finds an outlet in a stream or natural watercourse, and that the injury, if any,

resulting to a lower landed proprietor over whose land it flows is incidental only and for which no damages will accrue nor relief be awarded by enjoining a continuance of the drainage of such surface water by the method resorted to for that purpose. The authorities cited in the opinion of the case last referred to fairly support the proposition stated in the syllabus. *Morrissey v. Chicago, B. & Q. R. Co.*, *supra*, was a case involving the right to deflect surface water in the construction of a railroad embankment, and it is held, following the common law rule, that where such an embankment is not negligently constructed and it deflects or throws back surface water from its natural course, the railroad company is not liable in damages to the proprietor of neighboring lands thereby incidentally overflowed and injured. A large number of authorities are reviewed in the opinion. Among others, *Gannon v. Hargadon*, 10 Allen (Mass.), 106. In that case it is said: "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil. * * * A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*." *Anheuser-Busch Brewing Ass'n v. Peterson*, *supra*, announces the principle just alluded to in the fifth paragraph of the syllabus, wherein it is stated: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage." The next paragraph declares: "But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate

cause of injury to his neighbor, he is accountable therefor." *Lincoln & B. H. R. Co. v. Sutherland, supra*, reiterates that the doctrine of this court is the rule of the common law that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjacent proprietors by reason of such defense he is not liable therefor. It is said, however, "The rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor." In that case a railroad company was held legally responsible and liable for constructing its roadbed and embankment over a draw where surface water produced by rains and melting snow were wont to run from the surrounding territory and thence into the Platte river, without making provision for a culvert or opening through the embankment over such draw for the escape of waters flowing naturally therein. The same principle was again enunciated and adhered to in *City of Beatrice v. Leary, supra*, where the act of negligence, for which a recovery was allowed, consisted in the obstruction of a draw through which flowed surface water, resulting in the overflowing of the land of an adjacent proprietor. In *Jacobson v. Van Boening, supra*, the former decisions of this court were exhaustively reviewed and were declared to be harmonious and to rest upon the principles announced in the syllabus in that case. It appears from the opinion that an injunction against diverting surface waters collected in ponds and lagoons of an upper proprietor and throwing them on lower lands was granted and made perpetual, but solely on the ground that the plan adopted for the diversion of such waters was not the most reasonable and practical method of reclaiming the land sought to be relieved from such surplus waters, and that such plan unnecessarily burdened the plaintiff's land in that action with an increased flow of surface water by reason of the construction of the artificial channels or ditches constructed for such pur-

pose. In the opinion it is said: "The damage alleged is that whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north and thence along the highway of the draw, discharging a large body of water thereby across plaintiff's land, cutting trenches and covering the land with accretions. It also appears that by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land." Again, it is said by the author of the opinion, after discussing other matters: "With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land." See also *Churchill v. Beethe*, 48 Neb. 87, and *Gilmore v. Armstrong*, 48 Neb. 92. The supreme court of Illinois, in *Peck v. Herrington*, 109 Ill. 611, holds to the doctrine that "The owner of land upon which there is a pond, in which is collected the surface water, only, from rains and melting snow, when good husbandry so requires may drain the same by an artificial drain constructed upon his own land, whereby its water is thrown into the same outlet or natural drain it was accustomed to take before, when the pond was full, notwithstanding the flow of the water over a servient tract of land may thereby be increased." The same court in *Anderson v. Henderson*, 124 Ill. 164, again announces the same doctrine and holds to the rule that the drainage of surface water by ditches and drains into the natural and usual channels which nature has provided, even if the quantity of water thrown upon the next adjoining landowner is thereby increased, does not give rise to a cause of action. *Hughes v. Anderson*, 68 Ala. 280, declares the rule to be that "The owner of lands has a right to drain them by

artificial ditches, although thereby the water is precipitated more rapidly, and in greater volume on the lands of an adjacent proprietor below, provided he does not thereby cause water to flow on the lands of such adjacent proprietor, which, in the absence of the ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the welfare of his neighbor." In *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, it is declared in the first paragraph of the syllabus that "The old common law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule, it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible; and, he is entitled to deposit the same in such natural drain, though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him." The doctrine thus announced is in the main the same as held to in this jurisdiction.

The common law rule as to the control and disposition of surface water is in force in this state. In fighting the common enemy, however, the rights of other landed proprietors are to be regarded. The upper proprietor may not act in a negligent manner. He may by artificial channels drain mere surface waters accumulated in ponds, lagoons or basins and throw them in greater quantities into a natural surface water channel or draw and onto an adjoining estate, even though the flow in such natural drain is thereby increased on and over the lower estate. He cannot divert the water in a different direction but must conduct it according to the natural course of drainage, and when such is done there is no legal wrong committed.

The following principles are, we think, fairly deducible from the authorities cited: 1. An owner has the undoubted right to protect his land from mere surface water and, in the interest of good husbandry, to drain lagoons or basins

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thereon of a temporary character, by discharging such surface waters by means of artificial channels into a natural surface water drain and through such drain or channel on and over the land of another, provided such person acts in a reasonable and careful manner and without negligence, and the injury, if any, resulting therefrom to such lower proprietor by reason of the increased flowage in the natural surface water drain will be accounted *damnum absque injuria*. For negligence in the manner of accomplishing the improvement, such owner is responsible and accountable to those injured by his negligent acts.

2. An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment.

The conclusion reached by the district court, as evidenced by its judgment, is supported by the prior decisions of this court, and is in harmony with the general principles governing the control of surface waters, and the same, therefore, should be, and accordingly is,

AFFIRMED.

THOMAS N. NAUDAIN, JR., APPELLEE, v. HERBERT R. FULLENWIDER ET AL., IMPEADED WITH WILLIAM D. MIXTER, APPELLANT.

FILED JUNE 30, 1904. No. 13,456.

1. **Mortgage: ATTACHMENT: PRIORITY.** Where a mortgagee claims a lien on real estate through a deed filed for record subsequent to the levy of an order of attachment on the same land as the property of the grantor in such deed, the order of attachment and the return of the sheriff showing the levy being duly recorded in the office of the recorder of deeds before the recording

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of such deed, the mortgagee takes with notice of the rights of the attachment creditor and subject to such infirmities as inhere in the title of the mortgagor.

2. ———: ———: ———. A prior unrecorded deed passing title to real estate, if made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before the deed based upon such attachment or judgment. *Harra v. Gray*, 10 Neb. 186.
3. Appeal: TRIAL DE NOVO. Upon an appeal in equity this court will try the issue *de novo*, and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusions of the trial court, derived from the consideration of the evidence of witnesses examined in the presence of the court, will not be regarded, unless upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730.
4. Evidence examined, and held that the deed through and under which the mortgagee claims a lien on the land in controversy was not delivered to the mortgagor until after the levy of the order of attachment, and that the mortgagee's lien is subject to that acquired by the attachment creditor by virtue of the levy of such attachment.
5. Reversal. The conclusions and decree of the trial court finding and holding to the contrary are reversed.

APPEAL from the district court for Garfield county:
JAMES N. PAUL, JUDGE. *Reversed with directions.*

Doyle & Berge, for appellant.

C. H. Balliet, contra.

HOLCOMB, C. J.

The right of the plaintiff, appellee, to the enforcement of a lien on the real estate in controversy, lying in Garfield county, arises by virtue of a mortgage executed on the 20th day of July, 1901, by one Herbert R. Fullenwider. The appellant, Mixter, who was a defendant below, claims a lien on the same land under an order of attachment issued in a certain action then pending in Lancaster county and resulting in a judgment in his favor, wherein he was

plaintiff and one John C. Fullenwider was defendant, which was on the 21st day of May, 1901, levied on the same real estate described in plaintiff's mortgage as the property of the attachment debtor. A copy of the order of attachment and of the return of the sheriff making the levy was duly filed in the office of recorder of deeds of Garfield county and recorded in the proper record on the same day the levy was made. On the 23d day of May following, a deed purporting to have been executed by the attachment debtor John C. Fullenwider to Herbert R. Fullenwider and bearing date May 3, 1901, was presented and duly filed for record and recorded in the office of the said recorder of deeds. Afterwards and on the 20th of July, the mortgage above mentioned was executed in favor of the plaintiff. In view of the foregoing circumstances, it is clear that the mortgagee when he accepted the mortgage under which he claims, took it charged with notice of the interest and rights of the attachment creditor by virtue of the levy of the order of attachment on the real estate as the property of the attachment debtor, and subject to any infirmities inhering in the title of the mortgagor, Herbert R. Fullenwider, by reason of the time and manner in which he acquired his title and interest in and to said land. When the mortgage was executed, the records of Garfield county, wherein the land was situated, disclosed that the order of attachment at the suit of the appellant had been levied on the land as the property of the attachment debtor and while the legal title, as appeared by the records, was in his name, and some two days prior to the time the mortgagor had recorded his deed evidencing a conveyance of the land from the attachment debtor to himself. The mortgagee had constructive if not actual notice of the then state of the public records and must be deemed to have acquired a lien subject to whatever rights the attachment creditor acquired therein prior thereto, and to stand in no more favorable light than would the mortgagor claiming under his deed from the attachment debtor.

In determining the respective rights of the parties to the controversy, regard is to be had to the rule that a prior unrecorded deed passing title to real estate, made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before the deed based upon such attachment or judgment. *Harral v. Gray*, 10 Neb. 186; *Mansfield v. Gregory*, 11 Neb. 297; *Hargreaves v. Menken*, 45 Neb. 668; *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, 724; *Westervelt v. Hagge*, 61 Neb. 647, 659. The pith of the present controversy is with respect to the question of the good faith of the transaction whereby John C. Fullenwider transferred or attempted to transfer title to the real estate in controversy from himself to his son Herbert R. Fullenwider who afterwards executed the mortgage which is now assailed by the attachment creditor. And this question presents a dual aspect. Was the transaction a *bona fide* sale of the land and, if so, when was the deed actually delivered to the grantee? The determination of these questions requires a consideration and weighing of the evidence and an ascertainment of the proper inferences to be drawn therefrom. The case comes here by appeal and for a trial *de novo*. We are, says the statute, to reach a conclusion independent of and without reference to the conclusion reached in the trial court. The evidence in the case is partly in the form of depositions and partly from witnesses who appeared in court and before the trial judge on the hearing therein. Having due regard to the fact that the trial court possesses an advantage over a reviewing court in the consideration and weighing of evidence of witnesses who appear before the court in the trial of a cause, we are to decide from the record as presented whether in view of all that is disclosed therein and of the fact just adverted to, a different conclusion should be reached from that announced by the trial court. It has recently been announced in considering the effect of the new statute regarding decisions in this court on appeal in actions in equity that this court will try the issue *de*

novo and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusion of the trial court derived from the consideration of the evidence of witnesses examined in the presence of the court will not be regarded unless upon the whole record, in view of the position of the trial court in weighing such evidence they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730. It is in the light of the rule as thus announced that we undertake a consideration of the controverted questions of fact in the case at bar.

The attachment debtor, John C. Fullenwider, is the father of the grantee in the deed filed for record just a short time subsequent to the levy of the order of attachment. It is earnestly contended by counsel for defendant Mixter the evidence warrants a finding that the deed from Fullenwider to his son although executed on May 3d, was only partially executed and, at the time, the name of the grantee was left blank and that possession was retained by the grantor and later on, after the order of attachment against him was issued and levied, the name of his son was inserted as grantee, the deed presented for record and thereafter delivered to his son as an executed contract. At the time the father lived in Lincoln, the son in Omaha, and the land lay in Garfield county. In support of the plaintiff's version of the affair and to establish the *bona fides* of the transaction, there is found evidence in the record tending to prove that an oral arrangement was made between the father and son on the 1st or 2d of May that the latter should take the land which the former was then anticipating securing a deed for, and that on the third, a deed was duly executed conveying the land to the father and also, at the same time, the deed in controversy executed by him to his son in pursuance of the prior arrangement, and that this deed was actually delivered to the son at Omaha on the 9th of May and by the latter mailed to the recorder of deeds of Garfield county on the 20th or 21st of May and received and filed for record on

the 23d. The crucial point seems to be with respect to the question of when the deed was actually delivered by the father to the son. There is in the record, with nothing to controvert it, evidence sufficient to show that the son paid an adequate consideration; in fact, while it appears that the land is worth but \$400 or \$500 it is testified to by both father and son that the consideration paid by the latter was \$1,200. The rule regarding transactions of this character is that a transfer of property by a debtor to a relative which has the effect of hindering or delaying other creditors in the collection of their debts will be scrutinized very closely, yet it will be sustained if made in good faith and for an adequate consideration. Other decisions go to the extent of holding that such transactions are *prima facie* fraudulent and the burden is cast upon a party thus claiming to clearly and satisfactorily establish the good faith of the transaction. There is strong evidence in the record, and as we view it, convincing, tending to show that the deed to the son was executed with the name of the grantee in blank. This is the best recollection of the notary public taking the acknowledgment of the grantors. It is also testified that on the 7th day of May, the father visited Garfield county and made inquiries regarding the probabilities of a sale and stated that he was in possession of a deed in blank so that a quick sale could be made if a purchaser could be found. At the time of receiving the deed for record, the county clerk testifies that the name of the grantee had been freshly written in the deed in ink the color of which had not changed as it would do after a short period of time. It is also testified that the deed when it was transmitted for record was sent by the father to the recorder with directions to record and to send to the grantee at his address in Omaha, and that with the letter of transmission was inclosed the necessary fee to pay for the recording of the instrument. There is evidence of an almost if not quite irrefragable character that the recording fee was transmitted with the deed by a money order drawn at the postoffice at Lincoln on the postoffice

at the county seat of Garfield county. According to the testimony of the grantor and grantee, the deed was transmitted for record from Omaha and the testimony to which we have just referred is wholly inconsistent with the theory of the plaintiff in this respect. The evidence to uphold the transaction and to prove delivery before the levy of attachment is confined altogether to the testimony of the father and the son. The original deed was not offered in evidence. Other evidence of a wholly disinterested character is in very sharp conflict with the evidence offered to uphold the validity of the conveyance. We find no way of reconciling the apparent conflict and are compelled to make such deductions as seem to be warranted from contradictory testimony of the character just referred to. The circumstances appear to us to point unmistakably to the fact that the conveyance of the father to the son and the delivery thereof were the result of and expedited by the suit instituted and the attachment levied by the defendant Mixer. We conclude from a careful consideration and full examination of the entire record that the delivery of the deed from John C. to Herbert R. Fullenwider was subsequent to the levy of the order of attachment, and consequently the grantee took the land charged with the lien of the levy, and the mortgagee's lien, likewise, is subordinated to that of the levy of the order of attachment. The conclusion reached by the trial court awarding to the mortgagee a first lien should be reversed and a decree entered in this court giving to the attachment creditor the first lien by virtue of his levy and to the mortgagee a second lien. A decree will be entered in this court in conformity with the conclusions we have herein announced.

DECREE ACCORDINGLY.

LENA MARGARET LILLIE V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,227.

1. **Criminal Law: JURY.** In criminal trials the question of the qualification of a juryman is one of fact for the determination of the trial court, and, unless it appears to be against the weight of the evidence, it will not be overruled by this court.
2. **New Trial.** In capital cases a new trial should not be allowed on account of newly discovered evidence unless its introduction on the trial might have been beneficial to the defendant, and might have led to a different result.
3. **Murder: PROOF OF MOTIVE.** Proof of a motive to commit the crime charged is always competent in murder trials; the fact that the alleged motive is out of proportion to the crime committed does not require that evidence of such motive be excluded. The supposed danger that the jury may give too much weight to the offered evidence is not a legal ground for excluding it.
4. **Trial: EVIDENCE.** When a witness testifies positively to a conversation with an acquaintance over the telephone, an objection to the evidence on the ground that the witness has not sufficiently identified the person with whom the conversation was held should not be sustained, the witness's knowledge of such identity not having been tested by cross-examination or otherwise. The force of the evidence is a question for the jury.
5. **Evidence: USE OF FIREARMS.** In the trial of a defendant charged with the crime of murder with firearms, it is not error to permit evidence that the defendant has for many years been familiar with the use of such firearms.
6. —: **DISCRETION.** Under some circumstances it is in the discretion of the trial court to permit evidence of experiments to illustrate transactions that have been testified to; and, under the circumstances in this case, the court did not abuse its discretion in permitting such evidence.
7. **Harmless Error.** If, in a criminal trial, evidence is received that is not from its nature necessarily injurious to the defendant, and the receiving of such evidence is not objected to when the same is offered, nor complained of in the petition in error in this court, the error, if any, will be considered to be without prejudice.
8. **Evidence.** In a trial of an information for murder, it is proper to prove the physical conditions existing in the vicinity of the murder at the time the crime was committed. This applies to evidence of finding of unusual articles, as pepper and matches.

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upon the floors of the living-rooms of the house where the crime was committed.

9. ———. In murder trials, it is competent to prove the conduct, appearance and actions of the accused immediately after the crime was committed, as well as subsequent statements of the accused tending to show her connection with the transaction being investigated.
10. **Instruction.** In criminal trials, the previous good character of the defendant has great weight as tending to show the improbability of guilt. The weight to be given such evidence is for the jury to determine. The court is not required to tell the jury that, if the other evidence is sufficient to satisfy the jury of the defendant's guilt, they must still consider whether previous good character, when weighed with all the other facts and circumstances in the case, raises a reasonable doubt of guilt.
11. ———. It is not error to instruct the jury that the defendant is under no obligations to testify in her own behalf, and that the statute expressly declares that her neglect to testify shall not create any presumption against her.
12. **Trial: MOTIVE.** It is not indispensable in criminal trials that a motive be shown for the commission of the crime charged. If the evidence shows beyond a reasonable doubt that the defendant committed the crime, the prosecution does not necessarily fail because the real motive for the act cannot be discovered and shown to the jury.
13. **Instruction: REASONABLE DOUBT.** An instruction that: "A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases, but in view of the former decision of this court in *Barney v. State*, 49 Neb. 515, we cannot reverse the judgment in this case solely on the ground of giving this instruction.
14. **Circumstantial Evidence.** When the evidence relied upon to establish the guilt of the defendant is circumstantial, the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with the guilt of the defendant. When the minds of reasonable men might fairly differ as to whether there is any reasonable doubt of the defendant's guilt,

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the responsibility must be left, where the law places it, with the jury. The evidence in this case, under this rule, supports the verdict and judgment.

15. Evidence. In a prosecution for murder committed with firearms, evidence that the defendant had access to a weapon of that nature with which to commit the crime is important, but, if it appears that there was opportunity to conceal such weapon after the crime was committed, such evidence is not indispensable.

ERROR to the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matt Miller, C. H. Aldrich, Hamer & Hamer and W. V. Allen, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

SEDGWICK, J.

In the early morning of the 24th day of October, 1902, Harvey Lillie was killed at his home in David City. The circumstances were such that all parties agree that he was wilfully murdered. Lena Margaret Lillie, who was his wife, was charged with the crime, and upon her trial in the district court for Butler county was convicted of murder in the first degree, and sentenced to imprisonment for life. She has brought the record of her conviction to this court for review upon petition in error, and urges that the judgment against her should be reversed because the evidence was circumstantial and was insufficient to justify her conviction, and because of errors in the prosecution against her which prevented a proper investigation of the charge.

1. It is contended that the jury was incompetent; that two of its members, before the jury was impaneled, had formed and expressed opinions as to the guilt of the defendant. In the brief for the defendant, it is said: "The court will grant a new trial because of the prejudgment of a juror, when its attention is challenged to it after ver-

dict, in the same way that it excuses a juror on his *voir dire* examination when the thing was known."

In *Murphey v. State*, 43 Neb. 34, this court said: "Where the evidence by which it is sought to impeach a verdict on account of the prejudice of a single juror, subsequently discovered, is conflicting, an order denying a new trial will not as a rule be disturbed on appeal."

Substantially the same rule was announced in *Clough v. State*, 7 Neb. 320, 347; *Carleton v. State*, 43 Neb. 373; *Hill v. State*, 42 Neb. 503, and in other cases.

In *Bliss v. State*, 117 Wis. 596; 94 N. W. 325, the court said: "The question whether the juryman was disqualified was one of fact for the determination of the trial court, and as such decision does not appear to have been against the weight of the evidence it will not be determined by this court."

When may the evidence be said to be conflicting within the meaning of the decisions of this court? The conflict, of course, must be a substantial one. The evidence must be of such a nature that the presumption of the correctness of the ruling of the trial court is not overcome. The law affords the defendant in criminal prosecution great latitude in the examination of jurors to ascertain whether there are just grounds for challenge. The trial court hears this examination, and will suggest or propound further questions if necessary to ascertain whether the juror is fair and impartial, or may possibly be prejudiced for or against the accused or may have formed or expressed an opinion upon the merits of the questions that are to be tried. The trial court observes the conduct and demeanor of the juror during this examination, and will not hesitate to exercise its discretion and excuse the juror if there is substantial ground to believe that he is for any reason unfit for the service. The rulings of the trial court in the exercise of this discretion will not be disturbed simply because there may seem to be some preponderance of evidence against it. There must be such substantial evidence as to make it appear that in view of all of the evi-

dence bearing upon the matter, and the circumstances surrounding the examination of the juror, the trial court has abused its discretion in refusing a new trial upon this ground. In this case, the examination of the juror Carlisle is not preserved in full. It is shown by affidavits that upon that examination the juror stated that he had not formed or expressed an opinion as to the guilt or innocence of the accused. It is not shown in what connection that statement was made by the juror nor whether it was qualified or explained by him. It does not appear that the defendant might not have discovered the truth as to the qualifications of this juror by a proper *voir dire* examination. The evidence as to conflicting statements made by the juror, out of court, is somewhat indefinite. It is unqualifiedly contradicted by affidavits of other witnesses. The whole evidence is not sufficient to show that the trial court abused its discretion in overruling this objection.

Two witnesses testified by affidavit that the juror Joseph Hilger made statements in their hearing some time before the trial, which would show that he had formed an opinion as to the guilt of the defendant, and which amounted to an expression of such opinion. These affidavits are unqualifiedly denied by the affidavit of the juror and of Myrtle Hilger his wife. The conversation, in which the statements are alleged to have been made, was in the presence of both of the witnesses testifying thereto. The witnesses, however, do not precisely agree as to the form or substance of the statement. We find nothing in the record indicating that the evidence of these witnesses should prevail against the evidence of the juror and his wife, and we cannot see that in overruling this objection the trial court abused its discretion. The affidavit as to the statements of the juror Pool made prior to the trial, does not show that this juror had formed or expressed an opinion of defendant's guilt and is wholly insufficient to overcome the positive statements of the juror's affidavit, and the presumption of the proper exercise of its discretion on the part of the trial court.

2. One of the grounds of the defendant's motion for a new trial was that evidence in her favor had been discovered since the trial. Shortly after Mr. Lillie was killed, there was found on a vacant lot in another part of the city a man's shirt alleged to have been marked with blood spots indicating, as it was claimed, that it had been discarded by the murderer to avoid evidences of guilt. This circumstance was known generally by the public, and also by the defendant, long before the trial, and no reason is shown for not having brought this evidence to the attention of the jury, if it might be of any assistance to the defense.

It was not shown in the evidence before the jury that this defendant at the time was in possession of a weapon with which she might have committed the crime. This fact is of importance in connection with the question of the sufficiency of the evidence to sustain the verdict, as will be hereafter noticed. Upon the motion for a new trial on the ground of newly discovered evidence, it was shown by affidavit that sometime after the trial a revolver had been found in an unused well upon premises not far distant from those upon which the murder was committed. Three of the five chambers of this revolver were loaded with bullets at the time it was found, the other two chambers being vacant; and it was claimed that this evidence would indicate that the murderer, in his flight from the premises, had thus disposed of one of the evidences of his guilt. Counter affidavits were filed showing that Mr. Lillie, the deceased, had a similar weapon in his possession sometime prior to the murder. It has been held that in civil cases: "A motion for new trial will not be granted on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict." *Gran v. Houston*, 45 Neb. 813; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753; *Hill v. Helman*, 33 Neb. 731.

In capital cases the newly discovered evidence must, at least, be of such a nature as to make it appear that its

introduction upon the trial might have been beneficial to the defendant, and might have led to a different result. The defendant was not arrested until several weeks after the crime was committed, and the finding of this revolver would no more tend to prove that some other party had committed the murder, and had placed it where found, than it would to prove that it was placed there by the defendant herself. No reason has been suggested for supposing that this evidence might have produced a different result in this case.

3. It was proved upon the trial that the defendant had been for several years dealing upon the Chicago board of trade. For some time her ventures had been profitable, so that on the first day of May, about six months prior to the murder, there was a balance with the broker in her favor of \$510, but from that time until the death of her husband she was less fortunate. In this short period, her losses amount to more than \$1,000, and although the evidence shows that during the entire time of her dealings her net loss was only \$100, it appears from the uncontradicted evidence of her broker that she gave him an order on the day before the murder, in which she risked two or three hundred dollars more, and on that day she was notified that it would be necessary for her to "put up" two hundred dollars as the market then stood, and that if it should advance still further three hundred dollars would be required; although the broker had not in fact placed this order, yet, she supposed he had, and understood that she had incurred this loss.

It is contended that this evidence was incompetent, that it tended to prejudice the jury against her and served no legitimate purpose in the case. The same objection is made to receiving in evidence several letters written by the defendant to Mr. Runyon, her broker in the foregoing transactions. One of these letters was written within three or four days after the homicide and the others a little later. In one of these letters, she said:

"That little trade I had there I suppose you took care of

it and I will make it all right some day. I think it is going to make me some money soon. They have no way of knowing anything only through you and I beg of you to be careful and what trades on your books that I spoke of are mine and the rest are yours you understand.

"Be careful what you say. I told them that you never received any margin only through the mail and that the amount was merely inclosed in an envelope and sent. How they know anything is what I can't see, but they don't know much and if you want to ask me anything you can through the mail and it will be safe."

In another letter she said:

"And I will count on you staying by me as you should and you must as they are going to try to make your books a strong point against me and don't let them do it. They have not one single thing against me and so far they have not been able to dig up anything and do not be the means of such a thing yourself. I will count on you as a friend to do the right thing by me."

Another letter was as follows:

"Mr. Runyon:

"Remember that you are to stay by me on those books as you agreed to do. Do all you can for me and do me no harm."

Proof of a motive to commit a crime, is, of course, competent in murder trials. *Gravely v. State*, 45 Neb. 878; *St. Louis v. State*, 8 Neb. 405. It is argued in the briefs that it is so improbable that a wife would murder her husband for so small a consideration as to render this evidence wholly incompetent; but it should be improbable that a wife would murder her husband for any consideration, however large; and the fact that the motive shown is out of proportion to the crime committed does not require that the evidence shall be excluded.

Circumstances that tend to show a motive for the crime are to be considered by the jury, and in view of the fact that the defendant knew that Mr. Lillie's life was insured in her favor in something more than seven thou-

sand dollars, it seems proper that this evidence tending to show her disposition to speculate upon the board of trade, and her misfortune, and a special need of money at the time, should be given to the jury as tending to show a motive to commit the crime. It was for the jury to say whether an adequate motive had been shown, and the letters, showing her understanding of the transaction and her great interest in the details thereof, were clearly competent. For the same reason, evidence of her existing indebtedness to the banks at the time was proper to be proved to the jury.

Mrs. Lillie was engaged in dressmaking. She at times employed several girls to assist her in the business. One young lady was engaged with her at this time. The defendant appears to have had some credit with the banks. She occasionally borrowed small sums of money upon her unsecured note. She appears in one instance, at least, to have attempted to deal upon credit on the board of trade. Her statement in her letter to her broker that she would make her "little trade" with him "all right some day," and other circumstances in evidence, would indicate that she had no large amount of ready money. She appears to have been able to procure temporary loans. There is reason to believe from the evidence that she had no means of improving her financial condition permanently other than the earnings of her business, unless it should be from the insurance upon the life of her husband. It was certainly proper that the jury should understand these matters. There is nothing to indicate that the jury gave too much weight to the fact that she had been dealing on the board of trade. The fear that the jury might do so would be no legal ground for excluding evidence otherwise competent and proper.

4. In connection with the evidence in regard to the dealing upon the board of trade, the question arose as to Mr. Lillie's knowledge of these transactions. This was surely a legitimate inquiry. The defendant insisted, and introduced evidence tending to show that these dealings

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were in reality with the sanction, and for the benefit of Mr. Lillie, and were carried on in Mrs. Lillie's name, at his request, to avoid objections that his employers might make to his dealing in options while engaged in buying and shipping grain for them. If Mrs. Lillie was not acting for herself in these matters, and was relying upon her husband's judgment to direct her proceedings, it was important that the jury should know the facts. Her broker testified that his instructions from Mrs. Lillie were to not let Mr. Lillie know of her board of trade transactions. The girls of the telephone exchange were called by the state to prove that Mrs. Lillie had, several years before, at the beginning of these transactions requested them not to inform her husband of her talks over the telephone with her broker in carrying her board of trade deals. These speculations seem to have been continuous from the beginning. They were during the whole time largely conducted by conversations over the telephone. If this evidence is to be believed these employees of the telephone company continued under these instructions of secrecy from the time they were given. We see no reason to doubt the materiality of such evidence.

It is further objected that these witnesses did not show themselves competent. The point insisted upon, as we understand counsel, is that the witnesses failed to show that in fact it was Mrs. Lillie with whom they were talking, it appearing that the conversation was over the telephone. No objection, however, was made specifically upon that ground. The witness testified absolutely that she had a conversation with the defendant. No attempt was made to cross-examine, either before or after the evidence was given, as to the witness's means of knowing the identity of the person conversing with her. The evidence was properly submitted to the consideration of the jury.

5. Objection was made to evidence showing that the defendant had for many years been accustomed to the use of firearms, and error is now assigned in overruling this objection. The jury was undoubtedly entitled to know

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that fact, and its importance does not appear to have been exaggerated.

6. When Mr. Lillie was killed, there were two shots fired with but a short space of time between them. That the two shots were fired in quick succession is clearly shown by the evidence. One reliable witness, who was walking upon the streets of the town at the time, distinctly heard both of the shots and stated the distance he walked in the time that intervened between them. He was walking in an ordinary way, neither rapidly nor slowly. His evidence by ready computation shows that the time between the two shots must have been not more than eight seconds. It is assumed by both the prosecution and the defense that it was the first shot fired that killed Mr. Lillie, and that the second shot passed through the window glass, and also through the curtain on the inside and the wire screen on the outside of the window, and that both shots were fired by the same person. In determining whether these shots were fired by the defendant or by some other person, it became important to know at what distance from the window the last shot was fired. The curtain, the window and the screen through which the bullet passed were received in evidence, and witnesses for the state testified that they examined these immediately after the shooting and that the curtain was powder-burned. The state then offered evidence of experiments which had been performed for the purpose of illustrating how near the curtain the shot must have been fired to produce such result. This evidence was objected to and its admission is now assigned for error. The character of the curtain is not very clearly shown by the verbal testimony. It is described by some of the witnesses as a lace curtain, and by others it is said to have been made of cotton. The curtain itself was in evidence before the jury. The cloth used in making the experiments is described as common muslin. It is said in the defendant's brief that in making these experiments "the curtain itself was not used, nor a similar one, and was not hung five inches in front of the

original sash, or a similar one, with the wire screen three inches in back of that, similar to the one at the Lillie residence, and with the same gun that Harvey Lillie was murdered with, containing the same cartridges, or similar ones," and for these reasons it is contended that the evidence of the experiments should have been excluded.

In the experiments, the cloth was hung before a wooden surface and about six inches distant; no wire screen was used. It was not known what sort of cartridges were used by the assassin except that one of the bullets which was found in Mr. Lillie's head was in evidence before the jury, and also another similar bullet which was found in a building at some distance from the window and was at least partially identified by the evidence as the bullet fired at the second shot above referred to. It was therefore impossible in these experiments to use the same revolver with which Mr. Lillie was killed, or to be certain of the similarity of the cartridges used. In making these experiments, various revolvers were used of different pattern and of different length of barrel, and cartridges were used of different lengths, being what are called long and short cartridges, and of each length cartridge different kinds were used with reference to the character of the powder with which they were charged; some being filled with common black powder and others with lighter colored or semi-smokeless powder. A record was kept of each shot fired. The cloth used was in evidence before the jury. Each bullet mark through the cloth was fully explained to the jury, showing the kind of revolver and cartridge used in connection therewith, and the distance from which the shot was fired. The distances at which the various shots were fired range from about three inches to about three feet.

In *Davis v. State*, 51 Neb. 301, the court, after pointing out the similarity of the conditions existing in connection with the experiments proved, and the conditions existing in the transactions to explain which the experiments were offered, said:

"This was sufficient to make the evidence competent, and it was for the jury to consider the place where the displacement of the fixtures occurred and the place where the experiment was made and then to give such weight to the testimony of the state's witness who made the experiment as they thought it deserved."

And in *City of Ord v. Nash*, 50 Neb. 335, it was said:

"Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion."

The defendant offered evidence of experiments of the same general nature. The experiments complained of were under conditions as closely identical with the conditions of the transactions upon which they were intended to throw light, as the circumstances of the case would admit. The object of the experiments was to explain or illustrate how near a cloth curtain a pistol or revolver must be held in order that a shot fired from it through the curtain will powder-mark the curtain. It is true that it was not shown that any one of these revolvers used in these experiments was identical in construction and power with the weapon with which Mr. Lillie was killed, but there is evidence tending to show that the weapon from which the fatal shot was fired was an ordinary revolver. The defendant, in statements made immediately after the transaction, partially described the weapon, which she says she saw in the hands of the assassin.

We think the circumstances were such as to come within the above rule, and it was not an abuse of discretion on the part of the trial court to admit this evidence.

7. It is contended in the briefs that the court should not have allowed evidence that the sheriff organized a posse in the morning after the murder "with which he prospected the roads and streets, searched the alleys and questionable places, as well as the fields, without discovering a

questionable character, as he claims." When this evidence was first given no objection was made, and after the general statement had been made by the witness without objection and the witness was questioned further, the technical objection was made to the witness telling what they arranged to do, but no objection appears to have been made to evidence of what was actually done in that regard. There is no assignment in the petition in error raising this question. The defendant would certainly have a right to consent to the admission of such evidence as this, which might by some be regarded as likely to influence the minds of the jury favorably to the defendant, and having consented to its introduction cannot now predicate error in its admission.

8. Evidence was allowed that pepper was found sprinkled upon the floor at the foot of the stairway, matches and a "shoe-heel" were also found upon the floor of one of the lower rooms. It is said that it was error to receive such evidence. But it is certainly proper to show the conditions existing in the vicinity of the crime at the time. This evidence was directed to conditions observed so soon after the murder as to make its admission proper.

9. When the defendant first went downstairs with the girls after the murder, she went to the telephone and when the witness Hall arrived a few minutes later she was also at the telephone. She stated that she was trying to call assistance, but was unable to get any answer to her calls from the central office. The person in charge of the central office testified that no call was made, that he would have heard it if any had been made, as he had been aroused by another call shortly before five o'clock. It is urged that it was error to admit this evidence; that it was prejudicial as tending to create the impression with the jury that she was simulating and trying to hide appearances of guilt; but the evidence of defendant's actions at the time was competent as part of the *res gestæ*, and there was evidence supporting the defendant's theory that

she was unable to call the central office. One witness testified that he was sent to the central office to arouse the persons in charge and was for some time unable to do so. It was proper that the jury should consider all the testimony upon this point.

10. The court was asked to instruct the jury that "if, from all the other evidence, the jury would be satisfied of the guilt of the defendant they must still determine whether or not her previous good character, when weighed with all the other facts and circumstances in the case, raises a reasonable doubt as to her guilt; and, if such reasonable doubt remains, the jury must acquit," and it is insisted that it was error to refuse this request. There was ample evidence of defendant's previous good character. She ought to have the full benefit of that fact. We agree with her counsel that:

"Mrs. Lillie, having been put on trial for murder, had a right to have the jury know that she had an exceptionally high character; that her life had been pure and that she was devoted to the well being and happiness of her husband; and this being shown the jury had a right to say that it did in their judgment not only raise a reasonable doubt of her guilt but that her character was so strong they preferred under the solemnity of their oaths to believe she did not commit the crime."

Judge Cooley in *People v. Garbutt*, 17 Mich. 9, 25, said:

"Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of

guilt which would not otherwise exist, but it may bring conviction of innocence."

He also in the same case said:

"The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible. We refer particularly to the cases of *People v. Jenness*, 5 Mich. 305; *Maher v. People*, 10 Mich. 212, and *Durant v. People*, 13 Mich. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice. But to give it full effect, the jury must be left to weigh the evidence and to examine the alleged motives by their own tests."

The whole matter is for the jury to determine. The question being discussed is whether the matter was properly left to the jury. The proposition contained in the requested instruction is undoubtedly true. Good character has, and ought to have, great weight. The other evidence in the case may be sufficient to convict a person of bad character, when it would be wholly insufficient if good character were shown. But the same is true of other substantive matters of defense. Must the court single out each substantive fact in the evidence that tends to establish innocence, and tell the jury that if a consideration of all other evidence would require a verdict of

guilty, they must still consider whether the particular fact pointed out would not be sufficient to raise a reasonable doubt? The attention of the jury was directly called to the character of the defendant by the court, and they were told that evidence of good character was allowed as tending to show that she would not be likely to commit the crime charged against her, and that it was to be considered with all of the other evidence in the case and to be given such weight as the jury may deem it entitled to. There is nothing in the record to show that the jury did not give due weight to this evidence. We cannot say that there was error in this ruling of the court.

11. The defendant did not testify in her own behalf. An instruction based upon that fact was given to the jury copied from the instruction approved by this court in *Lamb v. State*, 69 Neb. 212, and we are asked now to say that it is erroneous. We are satisfied with the language there used and with the conclusion reached.

12. The court instructed the jury:

"You are further instructed that it is not indispensable that a motive be shown for the commission of a crime, but the existence or non-existence of such motive is a question of fact which must be determined by the jury from a consideration of all of the evidence in the case, and as a circumstance tending to show the guilt or innocence of the accused."

It is urged that this instruction is wrong because crime is not committed without some motive. But the instruction does not say that it is not indispensable that a motive exist. The human mind is sometimes unfathomable. A motive may exist, and there still be no direct evidence to show it. If, in fact, the crime was committed, and this is shown beyond a reasonable doubt, then it does not necessarily follow that no motive existed, because the evidence fails to show an adequate motive. It is therefore not erroneous to tell the jury that it is not indispensable that a motive be shown.

13. An instruction was given attempting to define what

is meant by the expression "a reasonable doubt." With the exception of one sentence, it was given to the jury in *Barney v. State*, 49 Neb. 515. The instruction here complained of contained the words:

"You are not at liberty to disbelieve as jurors if from all the evidence you believe as men."

These words were not included in the instruction quoted in *Barney v. State*, otherwise the instruction was practically the same in both cases.

This court refused to reverse the judgment in the case of *Barney v. State* on account of this instruction; but did not unqualifiedly approve of giving such language in the charge to the jury. The court said: "Whenever a court undertakes to define a reasonable doubt, it opens the way to a vast amount of speculative reasoning without any very practical application." The instruction may be deserving of some of the criticism it has provoked, but in view of the former decision of this court, we cannot reverse this judgment solely on account of the giving of this instruction.

14. The evidence relied upon to establish the guilt of the defendant is circumstantial. In such cases the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with the guilt of the defendant. It is earnestly contended that the evidence in this case does not meet this requirement. We cannot in this opinion reproduce this large mass of testimony, nor even set forth the substance of the evidence of the various witnesses. Some of the facts immediately surrounding the transaction of the murder are as follows: The defendant and her husband had for many years resided together as husband and wife in the community where the crime was committed. They appear to have lived happily together. There is much evidence in the record to that effect, and none to the contrary. The defendant had always borne a good character and reputation in the community where she lived, and is entitled to the presumption of innocence that always arises from a cor-

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rect and blameless life. She was engaged in dressmaking and appears to have been generally active and diligent in her undertakings, but there is nothing established showing avarice or that she was a "greedy, grasping woman." That night as usual they occupied the chamber by themselves. It was not a large room. There was a window opening to the east which was not far from the south side of the room. The bed was immediately in front of this window. The south end of the bed, where their heads rested, was about ten inches from the wall in which this window was located, while the foot of the bed was at a greater distance, undoubtedly about twenty-two inches, as disclosed by the evidence.

Mr. Lillie occupied the side of the bed farthest from the window and there can be no doubt, under the evidence, that when his position was first observed after the murder, the body was lying upon the back. There is some conflict in the evidence as to the exact position of the head, which will be again noticed. The defendant occupied the part of the bed nearest the window. These details and others that will be noticed later, are very important in determining two questions: First, Was the fatal shot fired from the east side of the bed? Second, If it was fired from the east side of the bed, could it have been done by any other person than the defendant herself? The bullet entered Mr. Lillie's head upon the right side, a little above the ear and somewhat further forward than the center of the head. Upon this point there is no conflict in the evidence. There was a post-mortem examination made by several surgeons, and their evidence was taken as to the course of the bullet through the head. The bullet passed through the brain, struck the skull on the opposite side of the head, failed to penetrate it, and was found near where it had struck the skull. Verbal descriptions of the course of the bullet indicate that the line of its passage through the brain was nearly perpendicular with the side of the head. A human skull was in evidence which was marked by the expert witnesses to indicate the point where

the bullet entered the skull of the deceased and also the point where the bullet struck the skull on the opposite side of the head. The witnesses substantially agreed that these marks upon the skull in evidence correctly indicated the course of the bullet. From this evidence it appears that the line of the bullet's course was not at a right angle with the side of the head, but that the bullet took a downward and backward course so that the point at which it struck the skull on the opposite side of the head was about two inches lower and about the same distance farther toward the back of the head than the point where the bullet entered. In connection with this circumstance, it is urged by counsel that when the body of the deceased was first observed, after the crime was committed, the head was turned to the west so that it rested upon the left side of the face; and that therefore the bullet might have been fired from the west side of the bed. This would agree with the statements of the defendant, who, immediately after the crime was committed, declared that Mr. Lillie was shot by a burglar from the west side of the bed; that she was awakened by this shot and saw the burglar with a revolver in his hand which was pointed at herself, and that the burglar approached her, and, to avoid being shot, she threw herself from the bed, so that the second shot, which was fired almost at the same time, passed over her and through the window before mentioned.

As to the position of the head of the deceased when first observed after the crime was committed, the evidence is not entirely satisfactory. Evidence upon this point becomes of greater importance because it is established beyond controversy by the expert testimony produced upon the trial that the effect of such a wound, through that part of the brain traversed by this bullet, would be to immediately take away all power of voluntary motion, so much so as to render it impossible that the deceased might have changed his position after the fatal shot was fired.

The defendant's little girl 12 years of age appears to have been the first witness who observed the position of the

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body. She seems to have gone into the room immediately. She says she tried to wake him up; that she took him by the ear, that it was his right ear that she took hold of. From the situation of the bed in the room, and the location of the door through which this child must have entered, as well as the location of the body upon the bed, she must have gone to the west side of the bed, and if she is correct in saying that she took hold of his right ear, the head must have been turned to at least a considerable degree toward the west.

Mr. Bert Hall, who appears to have been the next witness who saw the body, testified that the face was turned distinctly toward the west, and when further questioned as to the matter said that it was turned at least eighty degrees toward the west. By this he afterwards explained that he meant that it was turned at least four-fifths, and his evidence fairly construed is that the head was lying very nearly flat upon the left side of the face. He seems for some reason to have been very much confused, or, as he said, "nervous," and stated that he had testified a little differently he thought at a former examination, but that he was more confused then than he was afterwards.

Dr. Stewart, who first saw the body and afterwards changed the position of the head, was not called as a witness. The state refused to put him upon the witness stand at the request of the defendant. There were other witnesses whose evidence tends to show that the head was turned but very little, if any, and the face was directly toward the ceiling. It does not appear from the evidence whether these witnesses saw the body before the head had been moved by Dr. Stewart, or not until afterwards. There were several features of this evidence which rendered it a difficult task for the jury to determine the exact fact upon this question. The position of the head, when the shot was fired, may have been with the face turned somewhat toward the west from an upward position.

If the jury accepted the evidence of the witness Hall, and considered the course of the bullet through the head, it would lead to the conclusion that the weapon was held in a position directly over the head of the deceased. The shot then was fired either from that position, or from a position more to the eastward and, if the latter, the person who held the weapon must have been at the east of the bed at the time.

Another circumstance is worthy of mention in this connection. As before noticed the second shot was fired through the window. They were, of course, both fired by the same person. The bullet passed first through the curtain, then the window-pane, then an ordinary wire screen. It is beyond question from an inspection of these exhibits that the bullet in passing out of the window did not take a downward course. The evidence shows that the range of the bullet was such that if it had been fired from the west side of the bed, it must have passed within a few inches of the pillow upon which the head of the deceased rested. The weapon when the second shot was fired must then have been not more than six inches higher than Mr. Lillie's head. There was evidence from which the jury might reasonably believe that the weapon must have been much nearer the curtain to have powder-burned it as this curtain was. The circumstances seem to justify the jury in finding that the supposition that Mr. Lillie was shot from the west side of the bed was not a reasonable one. They are not, however, inconsistent with the view that the bullet came from the east. If the jury found, as it was not unreasonable to do from this evidence, that Mr. Lillie's face was turned but a few degrees to the west when he was shot, they must necessarily have found that he was shot from the east. We are driven to the conclusion that a finding that beyond all reasonable doubt Mr. Lillie was shot by some person who was then between him and the window in question cannot be held to be unsupported by this evidence. If the jury believed that this was the case, the conclusion that this defendant

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and no other person did the shooting seems also to be justified. The space between the bed and the window was very narrow. The course of the bullet was downward from the top of the head. The person who did the shooting must have been at least far enough to the south to be between Mr. Lillie's head and the window. If he had shot Mr. Lillie from that position, it would have been impossible that the second bullet shot at Mrs. Lillie and missing her, should have passed out of the window, as she says the bullet so fired did.

The defendant on the afternoon before the murder stated to the girls in the house that she had a large sum of money and would go and deposit it in the bank; that she feared burglars might break into the house and the money be stolen. Also immediately after the murder, she in the presence of several persons opened a bureau drawer in the room, and thereupon stated that her money was gone, and that she had about three hundred dollars in the drawer.

No attempt was made upon the trial to support these statements with proof that the defendant was in possession of any such sum of money. On the contrary it was shown that after making the above statements to the girls in the house, she was at the bank and paid a small amount on a note of hers and she made no deposit in the bank. This, as her counsel say, was because she did not at that time have an account with this particular bank with which she made a payment upon her note. The defendant also immediately after the murder, in the presence of the same witnesses, examined the clothing of Mr. Lillie and declared that his pocket-book had been taken and his money was gone. There was no proof offered on the trial tending to show that any pocket-book or money of Mr. Lillie's was missing after the murder.

It appears that the defendant, immediately after the second shot was fired, after having by her screams alarmed some of the girls who were sleeping in bedrooms immediately across the narrow hall, went downstairs with all of

the girls, who immediately went to a neighbor's house to call assistance, leaving the defendant alone in the house with the murdered man. She afterwards stated that she found the kitchen door open, the key having been dislodged from the lock and lying upon the floor, and that the burglar after the shooting ran downstairs. The evidence showed that this kitchen door was locked when the family retired that night, and there was also evidence tending to show that the keyhole on the outside of the door was seen the next morning to be filled with cobwebs and dirt, indicating that the door, if it had been unlocked in the night, was unlocked from the inside rather than the outside.

15. There was no evidence before the jury that the defendant possessed or had access to a weapon with which to commit the crime, and although the house was searched after the murder and no such weapon was found, still, in view of the opportunity that the defendant had for concealing such weapon, these facts, though entitled to careful consideration, are not so conclusive as to overthrow the evidence of guilt.

The duty of determining whether or not a fellow being has been guilty of so cold-blooded and unnatural a crime imposes a terrible responsibility. A wise provision of our law requires the judgment of twelve men upon such questions. Every reasonable precaution is required to guard against an unjust conviction. It is the duty of the courts to see that these are observed. If all of the rights of the accused have been protected, if upon the whole evidence the minds of reasonable men might differ as to whether there is reasonable doubt of guilt, the conclusion of the tribunal to which the law commits the responsibility must be taken as just. The wisdom of the past tells us that thus we have greatest assurance of avoiding the mistaken judgments to which the frailties of human reasoning sometimes lead. We conclude that the law does not require nor allow us to interfere with this verdict.

The judgment of the district court is therefore

AFFIRMED.

FRANK HENRY V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,297.

Criminal Law: VERDICT: REVIEW. It is the province of the jury to determine disputed matters of fact in criminal as well as in civil cases. The verdict will not be set aside in this court upon proceedings in error for want of evidence to support it, unless it is clearly wrong.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

George F. Boyd, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown*, *contra.*

SEDGWICK, J.

This defendant, plaintiff in error, was tried in the district court for Antelope county upon the charge of robbery. He has brought the proceedings to this court for review, and urges here that the evidence is not sufficient to support the verdict which the jury returned against him.

At about ten o'clock on the evening of the 21st of March, 1903, Walter Older was assaulted on the streets in the town of Brunswick in Antelope county, and at the point of a revolver was compelled to submit to search and robbery. A small amount of money was taken from his pockets. He accused this defendant of the crime, and upon the trial testified that he had known the defendant, who was a resident of the same town, for eight or ten years. He testified that he saw the defendant on the street, and that the defendant then and there committed the robbery, giving the circumstances in detail. The evidence is consistent, and, if it is believed, establishes the guilt of the defendant as charged in the information.

The witness described the general appearance of the

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defendant, and stated, among other things, that the defendant wore a common cap, and had a red handkerchief tied around the lower part of his face with the cap brought well down to his eyes, so that the witness could see that part of his face between the handkerchief and the cap. The witness was cross-examined in detail as to the appearance of the defendant at the time of the robbery, but he was not asked upon what he relied in identifying the defendant; and although it appeared that they were very close together, and the defendant spoke to him several times, the witness did not testify whether or not he recognized the defendant's voice. The witness had a lantern which furnished a strong light until it was extinguished by the defendant's orders. He positively identified the defendant, and there was nothing in his cross-examination making it necessary to believe that he was mistaken in this identification.

The defendant attempted to prove an alibi. Three witnesses testified that at the time the robbery took place, he was present while two of them were engaged in a game of billiards; but this evidence was contradicted by several apparently reliable witnesses who were at the billiard room at the time, and positively testified that the defendant was not there. The defendant testified in his own behalf and denied all connection with the crime, and corroborated the witnesses in support of his alibi. It was shown by undoubted evidence that the defendant on his preliminary examination testified that he had no revolver in his possession on the evening of the robbery; whereas it was proved on the trial, and admitted by the defendant, that he had two revolvers in his possession at that time. He was shown to have misstated other material matters. If this impeaching evidence was believed by the jury they would have been justified for that reason in rejecting his evidence so far as it was not corroborated by other proofs. It is the province of the jury to determine disputed matters of fact, and the evidence in this case is sufficient to support their verdict.

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No other reason for reversing the judgment being urged, and no substantial error appearing in the record, the judgment of the district court is

AFFIRMED.

CHARLES STOCK V. MELCHOIR L. LUEBBEN.

FILED JUNE 30, 1904. No. 13,747.

Bill of Exceptions. The trial court has no authority to extend the time for preparing and serving a bill of exceptions more than 80 days from the adjournment of the term at which the cause was tried, motion for new trial overruled and judgment entered. A bill allowed in violation of this provision of the statute will be quashed upon motion duly made in this court.

ERROR to the district court for Clay county: **GEORGE W. STUBBS, JUDGE.** *Motion to quash bill of exceptions sustained.*

Tibbets Brothers & Morey, for plaintiff in error.

Thomas H. Matters, contra.

SEDGWICK, J.

This motion to quash the bill of exceptions is based upon the fact that the bill was not presented to opposing counsel within 80 days from the final adjournment of the term of court at which the case was tried. There was quite a satisfactory showing of diligence on the part of the attorneys who procured the bill to be settled and allowed. This evidence shows that it was solely the fault of the court reporter, and the question is whether, under such circumstances, the delay beyond the 80 days in presenting the bill to opposing counsel is fatal to the settlement of the bill. It was held that such delay is not fatal in *State v. Gaslin*, 32 Neb. 291, and in *Richards v. State*, 22 Neb. 145, but in *Horbach v. City of Omaha*, 49 Neb. 851,

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the case of *Richards v. State* is reviewed fully and overruled upon this point, and the rule declared to be that the statute is mandatory, and that no bill of exceptions can be settled and allowed by the trial court that has not been presented to the opposing counsel within the 80 days. This ruling is followed in *Mathews v. Mulford*, 53 Neb. 252, and it is there stated that the remedy, when the delay has been caused by the neglect of the reporter in making the transcript, is by application for a new trial. Following these later cases, which seem to be well reasoned, this motion must be sustained. This places great responsibility upon the official reporters of the trial courts. It will rarely, if ever, happen that 80 days will be too short for the performance of this duty, if the importance of the matter is duly appreciated. Inefficient and negligent reporters should not be tolerated. The delay and expense of another trial, made necessary solely by the inefficiency of a court reporter, are serious matters.

MOTION SUSTAINED.

THOMAS B. STOCKER, APPELLANT, V. NEMAHA COUNTY
ET AL., APPELLEES.

FILED JUNE 30, 1904. No. 13,285.

1. **Appeal: REVIEW.** Where, on appeal from a judgment of the district court in a suit in equity, it is found that the evidence fully sustains the findings and judgment of the trial court, such findings will not be disturbed, but will be adopted by the court of review.
2. **Highways: DAMAGES.** Where one files a claim for damages caused by the location of a public road, and accepts the allowance made him by the county board, he cannot thereafter maintain an action against the county for damages caused by opening such road, unless the same be negligently and unskillfully constructed and maintained.
3. **Res Judicata.** Where a plaintiff in an action for damages alleges facts, proof of which would entitle him to recover, and there is a verdict and judgment against him, it will be conclusively pre-

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sumed that each of the facts so averred was determined against him, and he cannot thereafter maintain an action for equitable relief against the same defendant based on the same facts.

APPEAL from the district court for Nemaha county:
JOHN S. STULL, JUDGE. *Affirmed.*

S. P. Davidson and G. W. Cornell, for appellant.

E. B. Quackenbush and Kelligar & Ferneau, contra.

BARNES, J.

Thomas B. Stocker commenced this action in the district court to restrain the county of Nemaha, its board of commissioners and one Charles D. Nixon from keeping open a certain ditch running along the west side of a highway situated in that county known as the Half Breed road; to obtain a mandatory injunction requiring defendants to fill up and obliterate certain ditches, and to recover damages to his farm lands lying along the east side of said road alleged to have been sustained by him by surface water thrown upon his said land by reason of the careless, negligent and unskillful construction of said highway and ditches. A trial to the court resulted in a general finding and judgment for the defendants from which plaintiff has appealed. The pleadings are too voluminous to be set forth in this opinion. It is sufficient to say that the petition states facts which, if true, would constitute a cause of action against the county, and in addition thereto it charges the defendant Nixon with having cut a ditch from a lake or lagoon situated on his own land to and into the ditch, on the west side of the Half Breed road, thus augmenting the flow of water onto the plaintiff's land to his irreparable damage and injury. Nixon's defense is in substance a general denial; while the county not only denied the allegations of the petition, but also set up in its answer and relied on: First, an estoppel by conduct; and second, the defense of *res judicata*, or estoppel

by record and judgment. The replies in effect are general denials.

Under the present law, and the rule announced in *Faulkner v. Simms*, 68 Neb. 299, the appeal requires us to go over all of the evidence and reach our own conclusions thereon. A careful examination of the record and bill of exceptions discloses the following undisputed facts: The land southwest of plaintiff's premises slopes generally downward in a northeasterly direction toward the Nemaha river bottom where plaintiff's land is situated. The Half Breed road, commencing on the Auburn and Brownville road which runs east and west on the north line of section 22, a little east of the middle of the northeast quarter of that section, runs in a southeasterly direction, for the distance of something over 2 miles, passing the plaintiff's land and forming its western or rather its southwestern boundary. This road also intersects another road or highway, called the Wheeler road, which runs due north and south on the section line between sections 22 and 23, township 5, north of range 14 east, at a point about 60 rods south of the Brownville road. The Missouri Pacific railroad is constructed about 40 rods west of the Half Breed road, and runs nearly parallel thereto. A considerable part of the east half of section 22, and all of section 23, in which plaintiff's land is situated, is low, level bottom land, lying in the valley of the Nemaha river which runs in a southeasterly direction half or three-quarters of a mile east of the highway in question for some 10 or 15 miles, where it empties into the Missouri river. The railroad company has made several openings or culverts through its embankment for the purpose of allowing the surface water, which falls on the sloping land west of its line of road, to drain off onto the river bottom. Commencing in the year 1898 or 1899, and continuing from time to time until 1900 or 1901, the Half Breed road was established, constructed and opened for public travel, the plaintiff being one of the petitioners therefor. It appears that all of the water which plaintiff alleges causes

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the damage to his land is surface water; that which falls on the slopes to the west and southwest of the railroad track and highway in question. This water it is claimed is accumulated in the ditch made by the county in the construction of the public road, and is carried to a point west of the plaintiff's land, turned through a culvert in the highway, and allowed to spread out, over and upon his cultivated field. It further appears that some of the surface water, after it runs into the ditch on the west side of the Wheeler road, flows north to the Half Breed road and from there runs southeast in the ditch, which it is claimed is situated on the west side of that road, until it reaches the culvert above mentioned. It further appears that in order to facilitate the flow of the surface water from his land, the defendant Nixon has dug a small ditch about 26 rods long, in a northeasterly direction across the point of land situated between the two roads, and thus shortened the flow of the water, perhaps a third of a mile. There is no evidence showing, or tending to show, that the last named ditch drains any lake or spring or watercourse into the ditch on the Half Breed road; but, on the contrary, it simply carries off surface water caused by rains or melting snow from the lands to the west and southwest of the Wheeler road.

All of the other questions in this case are sharply contested, and the evidence relating to them is more or less conflicting.

The plaintiff claims that the Half Breed road is improperly and negligently constructed; that for that reason, and by the maintenance of a ditch on the west side thereof, the county has gathered up the surface water from the lands above described, and conducted it in a body through said ditch and thrown it upon his cultivated lands lying just east of the culvert above mentioned, which is designated in the record as culvert "B"; that if it were not for these wrongful acts on the part of the county, and the digging of the Nixon ditch, all of the water which flows onto his land would drain off to the east and north without

reaching his premises at all; while it is claimed on the part of the defendants that before the construction of the roads and ditches, before the Missouri Pacific railroad was built, and while the land in that vicinity was in a state of nature, unsettled and unimproved, the water complained of flowed by a slightly different route onto the plaintiff's land and rendered it unfit for cultivation in the same places and to a like extent as at the present time.

In order to maintain the issues on his part, the plaintiff employed a civil engineer, who surveyed the land in sections 22 and 23, including his farm situated in the last named section, and made a map or plat thereof with figures showing its contour. The defendants also employed a like expert, who performed the same services for them. These persons were called as witnesses, and, in addition to their oral evidence, presented their maps and figures to the court, in explanation of their testimony. Their statements differed but little; both testified that the lowest point on any of the lands in question, or in that immediate vicinity, is on the plaintiff's land, where he claims his crops have been destroyed; that from that point there is a gradual and almost imperceptible fall to the south and east into the Nemaha river. The engineer, called for the plaintiff, stated that the surface water, were it not for the road, ditches and culvert, would not reach the place where the damages are alleged to have been sustained; that a part of it would run off toward the north and east, and the balance would drain onto the plaintiff's land some 70 rods east of where it now flows. The surveyor called for the defendants testified that, were it not for the improvements complained of, all of the water, except in times of general overflows, would follow much the same course it does now; that some of it would pass around the point of the slight ridge west and north of the northwest corner of plaintiff's land, a little to the east of its present course, and finally reach the low ground immediately east of culvert "B," while the rest of it would flow onto his premises at another point about 70 rods east of his northwest cor-

ner, thus rendering two places wet and unfit for cultivation instead of one. A great number of non-expert witnesses were called and testified. Many of them were old settlers; some coming to the country as early as the year 1856; they were familiar with the situation of the plaintiff's land and the surrounding country, and had observed the course of the water complained of both before and after the roads and ditches were constructed; these witnesses testified that in early times the water ran in much the same course and direction as it does now; that the identical spot claimed to have been rendered unfit for cultivation was even then a low, wet, boggy piece of land; that when it was broken up it was so wet that the water ran in the furrows. It also appears that the water which falls on the land lying to the west and southwest of culvert "B" flows through certain openings or waterways in the track of the Missouri Pacific railroad into the wet place east of that culvert, and did so before the Half Breed road was constructed, that the ground there was so wet when the road was graded that it could not be worked with a road machine and could hardly be moved even with a common scraper. Of course the witnesses do not all agree on these matters, but the great weight and preponderance of the evidence establishes the foregoing facts.

There is no evidence in the record showing that the road was improperly or negligently constructed, except the statements of two or three witnesses who testify that culvert "B" is not in the proper place; that it should have been located about a half mile farther north and near the Nixon ditch, while the rest of the witnesses, including one of the engineers, stated that it is at the lowest spot on the road and the only proper place for its location. Many of the witnesses on both sides testified that the maintenance of the Half Breed road, which was made simply by plowing furrows on each side, and scraping the dirt therefrom into the center of the highway, does not cause any more water to flow onto the plaintiff's land than flowed there before its construction. So we are con-

strained to hold that the evidence amply sustains the general finding of the trial court. Indeed, we do not see how he could have found otherwise.

The evidence, so far as it relates to the acts of defendant Nixon, does not support the allegations of plaintiff's petition. It appears that Nixon's tenant at one time opened a small ditch from the lake or lagoon through which the water flowed as far as the land in question; that when plaintiff spoke to him about it he filled it up, and it has ever since remained in that condition; that the ditch which he dug from the Wheeler road across the point of land to the Half Breed road, does not increase the flow of water onto the plaintiff's premises. Therefore, the case as to Nixon was rightly dismissed.

It would hardly seem necessary for us to consider the defenses of estoppel and *res judicata* pleaded by the defendant county. However, we will dispose of these matters lest we be charged with overlooking them.

It is established beyond question that plaintiff, with others, petitioned for the location of that part of the Half Breed road which bounds his premises on the southwest; that he presented his claim for the damage which he believed would accrue to him by reason of the location and construction of the road, to the board of county commissioners of Nemaha county; that the compensation claimed was allowed, and he accepted and receipted for its payment. Ordinarily this would estop him from claiming any further damages by reason of the location of the road. It is claimed, however, that the compensation allowed him only included and embraced such damages as he would sustain by the proper construction and maintenance of the road; that if the road should be improperly constructed and should be maintained in such a manner as to flood his land with surface water and thus render it unfit for cultivation, he would still have the right to recover the damages caused thereby. This claim appears to be well founded. We think the courts generally have adopted this rule. But in this case the court found that

the county had not been guilty of any negligence in the construction and maintenance of the road, and therefore the plaintiff cannot recover.

Again, the record discloses that on the 28th day of November, 1900, plaintiff filed a claim for damages, which he alleged he had sustained during the years 1899 and 1900 by reason of the facts pleaded as the basis of this action, with the board of commissioners of the defendant county; that his claim was disallowed; that he appealed from the order of the board to the district court of said county where he filed a petition reciting the same facts on which he bases this action. In fact the petitions are almost identical with the exception of the prayer; that by a supplemental petition he sought to recover the damages sued for in this action. It is claimed, however, that this latter demand was withdrawn by leave of the court and was not litigated in that action. Issues were joined by pleadings almost identical with those filed in this action, and a jury trial was had which resulted in a verdict and judgment for the defendant county. So, even if it be conceded that the question of plaintiff's damages for the year 1901 was withdrawn from the consideration of the jury, yet that action was between the same parties, was based on identically the same facts, and presented the same issues that are joined in the case at bar. In that action it was found and adjudged that the road in question was properly constructed and maintained; that the county had not collected surface water in a body, and caused it, by ditches along the Half Breed road, to flow onto the plaintiff's land to his damage. Therefore, the questions of fact, on which he seeks to obtain equitable relief in this suit, have been settled and decided against him in a proper form of action by a court of competent jurisdiction. Where the same facts relied on for a recovery have been pleaded by the plaintiff in a former action, and in which proof of those facts would have resulted in a determination in his favor, the verdict and judgment in that suit having been against him, the record conclusively establishes an adjudication

of the issues in the subsequent action, and is a complete bar to a recovery therein. *Slater v. Skirving*, 51 Neb. 108.

For the foregoing reasons, the judgment of the district court is right and is therefore

AFFIRMED.

FRANK DONNER V. STATE OF NEBRASKA.

FILED JUNE 30, 1904. No. 13,436.

1. **Larceny: EVIDENCE.** A record kept by a stock yards company of the receipt, handling and disposition of car or train loads of stock, copied from a book or tab of original entries and from hearing another read the railroad company's waybills, is not competent evidence in a criminal case for the purpose of tracing cattle, alleged to have been stolen, to the possession of the accused.
2. **Witness: INSTRUCTION.** The law makes a defendant in a criminal trial a competent witness in his own behalf, and the court should in no manner disparage his evidence. Therefore, an instruction, otherwise correctly stating the rules by which the jury should determine the weight to be given to the evidence of the accused, and which concludes with the words, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction," is prejudicial to the defendant's rights.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE, *Reversed.*

Jackson & Williams and Brome & Burnett, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

BARNES, J.

Frank Donner was charged, in the district court for Antelope county, with the larceny of two steers, the property of one John Thompson. A trial resulted in his con-

viction, and he was sentenced to the penitentiary for the term of four years. On error proceedings the judgment was reversed and the cause remanded for a new trial. He was again tried, found guilty and sentenced to the penitentiary for a term of six years. From that judgment he brings error, and the case is now before us for the second time.

It appears that the steers described in the information were kept in the pasture of one Henry Wilson, situated in said county, and were seen there up to a short time before July 17, 1902, the date at which it was alleged they were stolen. It was shown that the plaintiff had a car load of stock in his possession on the 16th day of July, 1902, in the stock yards of the Fremont, Elkhorn & Missouri Valley railway company, at Oakdale, in Antelope county, Nebraska, and on that day shipped the cattle, consigned by the Antelope county bank, to the commission firm of Shelley, Rogers & Company, at South Omaha. It further appears that on the morning of the 17th day of July, 1902, a car load of stock was received by the South Omaha Stock Yards Company, which it is claimed was delivered to Shelley, Rogers & Company, and sold by that firm and accounted for to the Antelope County Bank. The testimony discloses that one of the steers in question was shortly afterwards found in the stock yards of Shelley, Rogers & Company; that it was purchased from them and shipped back to Antelope county. There was no direct testimony that the stolen cattle were in the plaintiff's possession in the stock yards at Oakdale with the cattle which made up his car load of stock shipment from that place to South Omaha, and in order to trace the stolen property it was necessary for the state to show that the identical shipment of cattle made by the plaintiff from Oakdale to South Omaha, after having been received by the stock yards company, was turned over to Shelley, Rogers & Company, and that the steer described in the information and found in the yards of the last named company was contained in said shipment. In this manner the state

sought to show that the stolen property had been in the possession of the plaintiff. In order to make this proof the state introduced in evidence a book said to have been kept by the Omaha Stock Yards Company, which is referred to in the bill of exceptions as exhibit "D." The introduction of this evidence was objected to as incompetent, immaterial, hearsay, and because the proper foundation had not been laid. The objection was overruled in so far as it related to page 2 of the book offered, and the same was received and read in evidence over the plaintiff's objections. This is assigned as one of the grounds of error. It appears that one William R. Thompson identified exhibit "D" and testified that he made it up from a tab that he used in the yards at the time the train containing the car load of cattle in question was backed into the chutes at the South Omaha Stock Yards, and from hearing another person read the way-bills. His cross-examination discloses the following facts in relation to this book.

Q. Mr. Thompson, the only entry that you made out at the time this car was backed into the chutes was the figures in the line under the words "car number"? A. Yes, sir. Q. That was the only entry you made in this book at the time you was out in the yards—at the time the cars were backed in? A. I copied this off of my tab. Q. You made no entries in this book at the time you were out in the yards? A. No, sir. Q. This book that you have here is a book that is made up afterwards? A. Yes, sir. Q. After these entries are put onto a book which you use in the actual work of checking they are afterwards transferred to this book? A. Yes, sir.

Thereupon counsel moved the court to strike out the entries on page 2 of exhibit "D" because they were hearsay, incompetent and immaterial, not the best evidence, and because no proper foundation had been laid sufficient to authorize the book to be received in evidence. The court overruled the motion, and the defendant excepted. This was the only way by which

the state attempted to trace the car load of cattle from the railroad company into the hands of the the stock yards company, and from that company to the consignee. It thus appears that the evidence in question was very material, and without it the stolen cattle were not traced into the possession of the plaintiff. It is therefore necessary for us to determine whether the court erred in receiving the book exhibit "D" in evidence. This book was not a book of accounts; neither was it a book of original entries, nor the original record of the transaction relating to the car load of stock sought to be traced from the possession of the plaintiff into the hands of Shelley, Rogers & Company. It appears from the evidence of the man who says that he made the entries that as to the record of the receipt of the car and its number, there was better evidence than the book. He testifies that the original entry or record was made on another book or tab, which he had in his possession in the stock yards at the time the stock was checked in. It further appears that he did not make the other entries in the book from his own examination or knowledge, but from hearing another person read the way-bills of the railroad company. He nowhere testifies that he ever compared the entries so made with the way-bills themselves, or with his book or tab of original entries, and strange to say he was not asked as to whether or not the entries contained in exhibit "D" were correct. So it clearly appears that no proper foundation was laid for the introduction of this evidence. Original books of account or letters cannot be admitted in evidence until the proper foundation has been laid. *Norberg v. Plummer*, 58 Neb. 410. In the case of *Holland v. Commercial Bank*, 22 Neb. 571, it was held error, and a new trial was granted on account of the introduction of books of account made by and in the handwriting of a clerk, who was neither called nor subpoenaed to verify the entries therein, nor was his absence accounted for. Books of account are receivable in evidence only when verified in the manner provided by section 346 of the code. *Gilbert*

v. Merriam, 26 Neb. 194; *Pollard v. Turner*, 22 Neb. 366; *Atkins v. Secley*, 54 Neb. 688. The book in question does not even purport to be a book of accounts. The most that can be said for it is that it is a record of car loads of stock received by the stock yards company, and it would seem that, being in the nature of a memorandum, even with the proper foundation laid, it could only be used by the witness who made it for the purpose of refreshing his recollection. This same book was offered and received in evidence on the former trial of this case. On that trial no evidence was introduced to show who made the entries therein, when they were made, or under what circumstances. For these reasons its admission was held error. It is apparent, from an examination of the record herein, that the state attempted to supply such omission on the second trial. In doing so it was disclosed that the book was not one of original entries, and was therefore not the best evidence. The failure to produce the original entries, or in other words the best evidence, was not explained, and the witness who copied such original entries into the book in question did not even testify that they were correct. So it is clear that the admission of this evidence was reversible error.

Plaintiff further complains of certain instructions given by the court on his own motion. It is said that although it was not reversible error to give either of the instructions numbered 8 and 9, yet the giving of both of them grouped together was prejudicial to the plaintiff. Both of these instructions define and explain a reasonable doubt. It is apparent that either one of them would have been sufficient, and that one is practically a repetition of the other. We have held, in several cases, that it is not reversible error to repeat an instruction unless it appears that such repetition might operate to the prejudice of the accused. Yet, we are frank to say that we are unable to commend such a course.

It is further contended that the court erred in giving instruction No. 10, on his own motion. This instruction

concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction." It is urged that it was reversible error for the court to thus suggest to the jury that the testimony of the defendant may have been given for the purpose of avoiding a conviction; and that this suggestion was calculated to disparage the testimony of the accused. The case of *Clark v. State*, 32 Neb. 246, is cited in support of this contention. In that case it was held that, "where a person on trial for a crime testifies in his own behalf, the court may instruct the jury that in weighing his testimony they may consider his interest in the result of the suit. The court, however, cannot, by repeating its statement in that regard, give it undue weight or say aught calculated to disparage the testimony of the accused." The state, to support the instruction, cites the case of *Carleton v. State*, 43 Neb. 373, where the trial court charged the jury as follows: "The jury are instructed that they have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of a crime; nor are the jury required to blindly receive the testimony of the defendant as true, but the jury are to fully and fairly consider whether it is true and made in good faith, and for this purpose the jury have a right to consider the interest of the defendant in this prosecution. The law presumes the defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony together with all the other evidence in the case, and if from all the evidence, the facts and circumstances proved, the jury have any reasonable doubt of the guilt of the defendant as charged in the information, then the jury should give the defendant the benefit of the doubt and acquit him." The court after much discussion, in which it was said that "true" and "made in good faith" were

synonymous terms, reluctantly approved of the foregoing instruction; but it will be observed that the instruction complained of, in this case, is much broader in its terms, goes farther and is more prejudicial to the accused than the one above quoted. In that instruction it was not suggested that the testimony of the accused might have been given in bad faith, and for the purpose of avoiding a conviction, while this one goes to that extreme length. We are unwilling to go any further in approving instructions of this kind than the rule announced in the *Carleton* case. No case has been called to our attention, and we have not been able to find one which seems to justify us in so doing. Indeed common experience teaches us that juries are prone to view the evidence of one who is on trial for a criminal offense with suspicion, and the court should not, by his conduct or instructions, in any manner disparage the evidence of the accused.

It is further contended that the court erred in receiving the testimony of the state's witnesses by which it was sought to prove confessions of guilt on the part of the plaintiff in error. It is unnecessary to determine this question, for the reason that the judgment must be reversed and a new trial granted on account of the matters hereinbefore considered. It may not be amiss, however, to say that it is the duty of the state when offering witnesses to prove the confessions or admissions of a person charged with crime, to fully qualify its witnesses by showing that such confessions or admissions were made voluntarily, in such a manner and under such circumstances as to make them competent evidence: that it is no part of the duty of the accused or his counsel to supply the element of competency by a cross-examination of the witnesses or otherwise.

For the foregoing reasons, we hold that the court erred in the admission of exhibit "D" in evidence, and in giving instruction numbered 10 to the jury on his own motion. The judgment of the district court is therefore reversed, and the cause is remanded for a new trial.

REVERSED.

OTIS A. WILLIAMS v. DANIEL B. DAUGHETEE, APPELLEE, C.
F. SMITH, APPELLANT.

FILED JUNE 30, 1904. No. 13,507.

Action: TITLE TO LAND: PROOF. In an action to try title to land against one in possession, when the issues are substantially the same as in the ordinary action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title, and not because of the weakness of that of his adversary.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

Jackson & Williams, for appellant.

E. D. Kilbourne, contra.

AMES, C.

This action was begun by Williams against the unknown heirs and devisees of one Robert Howell, and Daughetee and Smith, to foreclose a tax lien. The record title was in Howell, and Daughetee was in possession claiming title. There was no resistance to the tax lien and a decree of foreclosure thereof was rendered as prayed, but issues were made up on a cross-petition and answer between Daughetee and Smith, the latter claiming to have acquired the title of Howell by an executor's deed. The issues between the parties were thus substantially the same as they would have been in an action of ejectment, by Smith, as plaintiff, to recover title and possession.

It is elementary that in such an action the plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness of that of his adversary. Smith traced his title from the United States to one Henry Brown. Then follows a deed properly executed by Brown, but naming no grantee, and an instrument in the form of a deed to Smith, as grantee, executed by one Robert H.

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Morey, who describes himself as executor of the last will and testament of Robert Howell, late of Tioga county, New York, deceased; but there is no proof of the death of Howell, nor exemplification of a probate of his will either in New York or in Nebraska, and nothing therefore to establish that Smith has any title or interest in the land, and nothing entitling him to ask the court to inquire into the rightfulness of the possession of his adversary.

The district court rendered a judgment quieting title in Daughetee as against Smith, and the latter appealed. It is recommended that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

MARLIN C. YOUNG, APPELLEE, V. SARAH C. FIGG ET AL.,
APPELLANTS.

FILED JUNE 30, 1904. No. 13,579.

Action: VENDOR'S LIEN: DEFENSE. To an action by a vendor against a vendee of real estate in undisputed possession of the premises, to enforce a lien upon the lands for an unpaid residue of the purchase price, want of title in the vendor at the time of the sale or afterwards is no defense.

APPEAL from the district court for Sarpy county:
GEORGE A. DAY, JUDGE. *Affirmed.*

George A. Magney, Elmer S. Nickerson and Wright & Stout, for appellants.

Anthony E. Langdon, contra.

AMES, C.

This is an action in equity by a vendor in an executory contract for the sale of real estate to charge an unpaid

residue of the purchase price as a lien upon the land and obtain a decree of foreclosure and sale for its satisfaction in like manner as in case of a mortgage. The making of the contract itself is put in issue, but the findings of the district court, upon what we think is sufficient evidence, establish its existence and the possession of the defendant under it.

It is first contended that the vendor was not at the time the contract was made, and is not now, the owner of the legal title to the lands in question but that it belongs to a third person. The doctrine was established in this state so long ago as *Scott v. Twiss*, 4 Neb. 133, and, so far as we know, has never since been questioned, that this fact, if it exists, cannot be availed of by a vendee in undisturbed possession as a defense to an action to enforce a lien for the purchase price upon the land.

Secondly it is objected that the land lies outside of the territorial limits of Sarpy county and that therefore the district court for that county had no jurisdiction of the action. A careful examination of the evidence upon this point convinces us that it is not in substantial conflict, and that it abundantly supports the finding of the trial court in that regard, which is as follows:

"The court further finds that after the original government survey of Iowa and Nebraska the Missouri river slowly and gradually receded from the southerly meander line of Bellevue Island toward the south and southeast and that about the year 1881 that portion of the Missouri river running west of Bellevue Island abandoned its course also running east of the island. That during the years from the time of the government survey of Nebraska of 1856 down to the present time the lands in question were added slowly and gradually and imperceptibly on the southerly portion of Bellevue Island by the slow, imperceptible and gradual deposit of alluvium and accretions to said island and to the state of Nebraska."

The boundary line of the state at the place mentioned is also the eastern boundary of Sarpy county, so that the

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contention of the defendants that the land lies between that boundary and the Iowa state line is disposed of under this finding by section 2, article I, chapter 18 of the Compiled Statutes (Annotated Statutes, 4420), which reads as follows:

"In all cases where any organized county lies adjacent to any boundary line of this state, and it shall appear that any island, territory or tract of land lies between such county and the state boundary, and is not included within the defined boundary of any organized county, and is not a military reservation of the United States, such unincluded island, territory or tract of land shall attach to and be a part of such adjacent county for all purposes, until otherwise provided by law."

If this provision of the statute were not applicable, the jurisdiction of the court, at all events, would be unquestionable under the provisions of section 146 (Annotated Statutes, 4495) of the same article.

The district court found generally and specially for the plaintiff and entered a judgment as prayed. The defendants appealed.

It is recommended that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

HANNAH PENN V. JOHN J. TROMPEN, SHERIFF, ET AL.

FILED JUNE 30, 1904. No. 13,376.

1. **Trial: PLEADINGS.** Action of the trial court in making up the issues examined, and *held* not prejudicial.
2. **Fraudulent Conveyances.** Transactions between near relatives which have the effect of hindering, delaying and defeating creditors, should be carefully scrutinized.
3. **Instructions of the trial court** examined and approved.

ERROR to the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Billingsley & Greene, for plaintiff in error.

John S. Bishop and *A. S. Tibbets*, *contra*.

OLDHAM, C.

This is an action in replevin for the recovery of a corn sheller and the undivided half interest in a crop of growing corn and five horses. The suit was prosecuted by the plaintiff against John J. Trompen, sheriff of Lancaster county, and Charles Anderson and others, as defendants. Plaintiff claimed a special interest in the property replevied under two chattel mortgages, one executed by her son, Harwood Penn, and the other by her daughter-in-law, Stanza J. Penn. The sheriff claimed possession under an execution issued on a judgment of the county court against Harwood Penn and others; defendant Anderson claimed a special property in the five head of horses in controversy on a chattel mortgage executed by Harwood Penn, prior to the rendition of the judgment and prior to either of the mortgages executed to plaintiff. The only question involved in the controversy between plaintiff and the sheriff was as to the *bona fides* of plaintiff's mortgages. The question of the *bona fides* and priority of the mortgages of defendant Anderson was clearly and unequivocally established and the court properly directed a verdict in his favor, finding him entitled to a special property in the horses for the amount due on his note and mortgage. As between plaintiff and the sheriff the question of the good faith of plaintiff's mortgages was submitted to a jury; a verdict was rendered in favor of the defendant sheriff for possession of the corn sheller and the corn, and plaintiff brings error to this court.

This case was continued for a long time in the district court for Lancaster county before reaching this tribunal,

and many things are charged in connection with the preparation of the record in the cause below, which we can but hope are to be attributed to over-zeal of certain of counsel engaged in the trial of the cause, rather than to a deliberate attempt to mutilate and falsify the record. Be this as it may, the record first presented to this court was corrected by an additional transcript, made under the supervision of the trial judges before whom the proceedings were had, and, of course, on this record alone, the cause must be determined. It would serve no good purpose to even discuss the contentions with reference to the manner in which the original record was made up. Suffice to say, that it appears clearly from the additional transcript that the cause was originally instituted against the sheriff and Charles Anderson and others as defendants. It also clearly appears that although Anderson was not served with process, he came into court and filed an answer that the case was once tried before one of the judges of the district court for Lancaster county; that Anderson appeared and had judgment directed in his favor in that proceeding for the possession of the five head of horses, and, subsequently, for errors occurring on the trial, this judgment was set aside and the cause was transferred to the docket of another of the judges of the district court, where numerous motions were filed and ruled upon, the judge finally directing the defendants to each defend under the general denial contained in the sheriff's answer, and striking the other pleadings. The cause was then transferred to the docket of the third judge of the district court, before whom the trial was had, which we are now called upon to review. During the progress of the trial it was contended by defendant, that he should be permitted to file a separate answer in his own behalf as he claimed an interest in the five horses, which he could not prove under the sheriff's general denial. The court, thereupon, permitted the defendant Anderson to file a separate denial. This action is alleged against as prejudicial error. We cannot see how plaintiff was in any manner prejudiced

by this order. The case had been long pending with an answer by defendant Anderson alleging his special ownership in this property under his chattel mortgage. This answer was only stricken when the court made the order attempting to consolidate this defense with the sheriff's defense, under his general denial. Before the new answer was permitted to be filed, the trial judge called in his associate, who had made the order consolidating the two answers, and with his consent and concurrence permitted defendant Anderson to file his separate answer. The only party that could have been prejudiced by this answer was the defendant sheriff and he makes no complaint. Under the issues as found by the jury, if this separate answer had not been allowed, the verdict would have been for the sheriff for the entire amount for all the property on which he had levied his execution, and this included the five horses awarded to defendant Anderson.

Numerous errors are charged against the action of the trial court in the admission and exclusion of testimony. The record in the case is very voluminous and the proceeding was conducted evidently with much hostile feeling between counsel representing the litigants. The court, however, appears to have used commendable discretion in his rulings on evidence either admitted or excluded. While he permitted a liberal range of investigation into all the transactions between the plaintiff and her son and daughter-in-law, which led up to the execution of the mortgages on which she relied, in this, we think, he but followed the well approved rule that transactions between near relatives, which have the effect of hindering, delaying or defeating creditors should be carefully scrutinized.

The instructions given by the trial court are generally attacked by plaintiff's counsel, without pointing out any special defect in any of them or any particular paragraph which announced a vicious principle concerning fraudulent transfers. We have examined the instructions and they seem to have been prepared with great care and precision by the learned trial judge and to have submitted the

sole question of fact on which the controversy depended, that is, the consideration and good faith of plaintiff's mortgages, in a manner as favorable to plaintiff as the law permits. Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. KNUT B. HOLM, v. M. L. ELLSWORTH, JUSTICE OF THE PEACE.

FILED JUNE 30, 1904. No. 13,577.

1. **Review: NEW TRIAL.** Where no motion for a new trial is filed in the district court, errors alleged to have occurred during the progress of the trial will not be examined by this court.
2. **Transcript.** An offer to confess judgment in a suit before a justice of the peace need not be included in the transcript of such proceeding; it is sufficient if such offer be filed and certified to the district court with other papers in the case.

ERROR to the district court for Saunders county:
SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

John H. Barry, for plaintiff in error.

V. L. Hawthorne, contra.

OLDHAM, C.

This is a proceeding in error to review the action of the district court for Saunders county, denying a writ of mandamus. There is no motion for a new trial in the record nor are there any suggestions therein that one was filed in the court below. A motion for a new trial is a

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prerequisite to a review of alleged error, occurring during the progress of the trial in the district court, by this tribunal. It may be incidentally mentioned, however, that on the statements of the petition, the writ was properly denied. The object of the writ as shown by the petition was to compel a justice of the peace to incorporate in his transcript an offer by the defendant in that court to allow judgment to be taken against him in a certain amount. This offer need not be included in the transcript; it is sufficient if in writing signed by the party and filed with the justice at any time before trial. On appeal it should be certified up. This is all that is necessary to have it considered by the district court on the question of costs. *Ossenkop v. Akeson*, 15 Neb. 622.

We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LOUIS ISKE ET AL. V. STATE OF NEBRASKA, EX REL. HERMAN
E. PANKONIN, ET AL.

FILED JUNE 30, 1904. No. 13,584.

1. **Counties: BRIDGE REPAIRS.** Where there is a bridge over a stream which divides two counties and is a charge upon each, it is the duty of the county board of either county, when notified in writing by the other to join in a contract for the repairs of the bridge, to either comply with the notice by joining in the contract or unequivocally refuse to do so.
2. **Mandamus.** This duty may be enforced by mandamus.

ERROR to the district court for Sarpy county: GEORGE
A. DAY, JUDGE. *Affirmed.*

W. R. Patrick, for plaintiff in error.

Byron Clark, *contra*.

OLDHAM, C.

This action is brought to this court on error to review the judgment of the district court for Sarpy county, allowing a mandamus against the board of county commissioners of Sarpy county, commanding them to take action either affirmatively or otherwise upon the notice given by the county board of Cass county, that the wagon bridge across the Platte river, which divides the counties of Sarpy and Cass, is in need of immediate repair and that said board is requested to join the said board of Cass county in repairing the same.

The petition alleges, in substance, that the boundary line between the counties of Cass and Sarpy is the Platte river; that a bridge had been built across said river in said counties, and that said bridge is part of the public highway therein; that a part of said bridge had been recently washed away by high water and thereby rendered impassable; that it is in need of repair; alleges notice of these facts, and a refusal to act on such notice by the county board of Sarpy county. The return to the alternative writ admits that the Platte river forms the boundary line between the counties and was at one time *spanned by a structure called a bridge*, which has since been washed away; it alleges that there is a suit pending in the supreme court between the respective counties over the liability of Sarpy county for repairs of this same bridge, which is undetermined, and further that there are no funds on hand to be used for the purpose of making the repairs.

The trial court held the return insufficient and granted the writ. In this we think the trial court was clearly right. There is no merit in the contention that an action was pending in the supreme court for the reason that the question therein involved was the validity and construc-

tion of sections 87, 88 and 89 of chapter 78, Compiled Statutes (Annotated Statutes, 6085-6087), these being the sections which relate to bridges over streams which divide counties, and there had been already two opinions holding the statute valid and that each county may be compelled to contribute its share of the expense of necessary repairs made upon the bridge. *Cass County v. Sarpy County*, 63 Neb. 813, 66 Neb. 473. This last decision, while affirming the validity of the statute and recognizing the liability of each county to contribute, held, in effect, that there could not be a recovery by one county against the other on the contract made unless the contract was "entered into in such form and manner as would have been requisite to its validity if the bridge had lain wholly within Cass county, and its maintenance had been a charge upon its funds exclusively." In *Cass County v. Sarpy County*, 66 Neb. 476, this second opinion was set aside and the first decision reaffirmed. But during the extended and varied course of that lawsuit, the principle that each county was liable was distinctly pronounced, and was never shadowed by a doubt.

Section 88, chapter 78, Compiled Statutes (Annotated Statutes, 6086), provides, in substance, that if either county shall refuse to join with the other county to contract for the repair of any such bridge, the other county may make the contract and make the repairs and recover by suit from the county refusing its proportionate share of the expense. The foundation of this liability is an opportunity to join in making the repairs and a refusal of such opportunity. *Saline County v. Gage County*, 66 Neb. 839. The opportunity was offered the county board of Sarpy county and it cannot be permitted to escape liability, nor prevent the other county making repairs by non-action. If for any reason it should not want to join the other county, it was its duty to refuse to do so, and this refusal should have been unequivocally made. The fact that it may or may not have funds on hand to be used in making the repairs is no ground for non-action. Nor do we think it

just grounds for refusal. There is no provision of the statute making it such. On the other hand, the statute is express in its terms that if either county refuse to enter into contracts to repair, the other county may, and recover the proportionate share of the costs of making such repairs from the county so refusing.

We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**ELIZABETH E. SHANNON ET AL., APPELLANTS, V. CITY OF
OMAHA ET AL., APPELLEES.**

FILED JUNE 30, 1904. No. 13,447.

1. **Nuisance: ABATEMENT: NOTICE.** Where a city of the metropolitan class seeks to abate a nuisance consisting of stagnant water standing upon vacant lots, and where the statute and ordinance require that notice be given to the owner and an opportunity be given him to perform the work himself, the city authorities have no power or jurisdiction to proceed with the improvement until such notice and opportunity have been given.
2. **Notice. BOARD OF EQUALIZATION.** Where a statute requires that notice be given for "at least six days prior" to the meeting of the city council as a board of equalization, the notice must be given during the six days immediately prior to the date of the meeting.
3. ———: **CITY OFFICIAL.** The fact that the city attorney is the owner of lots which the city seeks to charge with a special assessment does not necessarily charge him with notice of the action of the various boards and officers of the city with reference to such lots.

APPEAL from the district court for Douglas county:
CHARLES T. DICKINSON, JUDGE. Reversed.

Franklin J. Griffen and Richard S. Horton, for appellants.

O. O. Wright and W. H. Herdman, contra.

LETTON, O.

This action was begun in the district court for Douglas county by Elizabeth E. Shannon and others, to enjoin the collection of certain special assessments levied to pay the expense of filling four lots owned by plaintiffs, the city of Omaha having by ordinance declared the lots to be a nuisance, by reason of the accumulation of stagnant water thereon. From a decree rendered dismissing the action for want of equity the plaintiffs prosecute this appeal. They rely upon the following points: First, that no notice was given to the owner of the premises before the alleged nuisance was abated; second, that the nuisance, if any, was created by the city, and that signing the petitions for grading by the then owner of the lots did not create an estoppel; third, that no legal notice of equalization was given, and, fourth, that no legal equalization was ever had.

It appears that on the 19th day of April, 1893, an ordinance was passed by the city council of the city of Omaha, the provisions of which are substantially as follows so far as pertains to the premises in controversy: Section 1. The present condition of the following lots and lands is hereby declared to be a nuisance, by reason of the existence of stagnant water upon the same or banks of earth caving over adjacent sidewalks: Lot 10, block 20, Poppleton Park, and lots 9, 10, 11, block 10, Poppleton Park.

Section 2 provided for notice in writing to be served upon the owner, occupant or agent of any lot upon which any of said nuisances may be found; fixed a date for hearing before the board of public works regarding the same, and provided for a notice by publication, if the owner, occupant or agent is unknown or can not be found.

As to lot 10 in block 20 the only testimony upon the subject of notice to the owner of the hearing before the board of public works as required by the ordinance is the fact that Exhibit 5 which purports to be a notice directed to A. J. Poppleton notifying him to abate the nuisance upon said lot within 60 days, and of the time and place of the session of the board of public works at which he might be heard in regard to said nuisance, was found among the files of the office of the board of public works, and that no other notice or notices of any kind served upon the owner of said lot was found in that office after a search made by the secretary of said board. The evidence shows that A. J. Poppleton was at the time of the passage of the ordinance the owner of this lot, and that he was a resident of the city of Omaha. There is nothing in the record showing any service of this notice, nor any proof whatever in regard to the service of any notice of any kind upon Mr. Poppleton with reference to this hearing. The giving of this notice was a jurisdictional prerequisite to the taking of any action by the board of public works with reference to the abatement of the nuisance. No notice having been given, the subsequent proceedings with reference to this lot were without authority of law and void. *Horbach v. City of Omaha*, 54 Neb. 83.

As to the lots in block 10, a similar notice was produced by the secretary of the board of public works. Below this notice and upon the same appeared the following words: "Please do the work at once and charge to property. A. J. Poppleton. S." The evidence shows that these words and signature were written upon the notice by one F. J. Sutcliffe. Mr. Sutcliffe testifies that he was in the employment of A. J. Poppleton during part of 1892. That it was his duty to have charge generally of his properties throughout the city and that he handled generally the properties. That it was his custom to look after all properties of Mr. Poppleton. That he looked after the repairs and improvements and took general charge of the property. From this evidence we are satisfied that Mr. Sutcliffe at the time he

wrote the order upon the notice was such an agent of Mr. Poppleton with reference to this property, that notice under the ordinance might properly be served upon him, and that the evidence is sufficient to show a compliance with the requirements of the ordinance as to notice.

It appears that a notice of the sitting of the council as a board of equalization to equalize a proposed levy to defray the cost of filling said lots was published in the Omaha Daily World-Herald and in the Omaha Daily Bee, two newspapers printed in the English language, 7 consecutive days next after and including the 14th day of March, 1893, and was also published in the Omaha Daily and Weekly Tribune, a newspaper printed in the German language, on the 14th, 15th, 16th, 17th, 18th, and 20th of March, 1893. Notice in the German newspaper was printed in the English language. The statute required this notice to be published for at least six days prior to the meeting of the board in three daily papers of the city. It appears that the Daily Bee and World-Herald were the only daily papers printed in the English language in the city. In the case of *John v. Connell*, 71 Neb. 10, it is said, in applying this statute to a similar state of facts: "The requirement of the rule as to publication of notice in the English language is met by the publication in both dailies printed in that language, they being all the daily publications in the city printed in English. The legislature hardly contemplated an impossibility, nor that a publication of the notice in English in a German daily paper should be had in order to comply with the statutory requirement." It would seem therefore that the requirements of the statute as to the papers in which the notice should be published have been complied with.

In *Leavitt v. Bell*, 55 Neb. 57, the phrase in the statute "for at least 6 days prior," is construed by the court and it is therein held that "the word 'for' in that phrase means 'during,' and the phrase must be construed as though it read, that the city council shall give notice of its sitting as a board of equalization at least during the 6 days im-

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mediately prior to the date of its so convening." According to this rule the notice should have been published for the 6 days immediately prior to the 24th day of March and this not having been done the notice was invalid.

If there was no proper and legal notice given of the time and place of the meeting of the board of equalization, it had no jurisdiction to act and its action was a nullity. For this reason the action of the board and the levy of the special tax complained of by the plaintiffs were of no force. *Wakeley v. City of Omaha*, 58 Neb. 247.

Since no brief has been furnished by the appellee, we are unable to ascertain upon what ground the trial court dismissed the pleadings for want of equity. It appears that Mr. Andrew J. Poppleton was city attorney of the city of Omaha at the time of these proceedings. But it could hardly be presumed that he was cognizant of the proceedings of every one of the city's various departments. The request to proceed with the work made by his agent, Sutcliffe, at most can only be presumed to be a request to proceed with the work in a legal and authorized manner and cannot be urged as an excuse for a failure to comply with the statutory prerequisites to jurisdiction to levy the tax. For these reasons we recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

HOLCOMB, C. J.

I do not agree to the proposition announced in the second paragraph of the syllabus.

**M. C. CLARKE, RECEIVER, APPELLANT, v. CHARLES E.
WOODRUFF ET AL., APPELLEES.**

FILED JUNE 30, 1904. No. 13,466.

Usury. The loan made to the appellee in this case *held* to be tainted with usury under the rule stated in the case of *Anselme v. American Savings & Loan Ass'n*, 66 Neb. 520, which is followed.

APPEAL from the district court for Buffalo county:
CHARLES L. GUTTERSON, JUDGE. Affirmed.

M. D. Tyler, for appellant.

Harrison & Pearne, contra.

LETTON, C.

This is an action to foreclose a mortgage executed by the appellee Woodruff to the American Building & Loan Association of Minneapolis, the name of which association was afterwards changed to the American Savings & Loan Association. This corporation afterwards became insolvent and the appellant Clarke was appointed receiver. In 1889, the appellee Woodruff made application to the association for a loan of \$500. By the rules of the corporation the shares were of the par value of \$100 each. Woodruff was an original subscriber for five shares and acquired five by purchase before he made application for the loan. His application was approved, the loan was made and he gave a bond and mortgage to the association for the sum of \$1,000, payable on or before 9 years from the date, which was December 31, 1889. The bond and mortgage provided for the payment of interest at 6 per cent. per annum payable monthly on the sum of \$500, and also for the payment of \$7 per month as "dues on the said shares of capital stock." Woodruff actually received \$495 in cash, \$5 being retained for expenses of recording, etc. He made monthly payments as required by the terms of the bond and mortgage up to January 6, 1896, when he

ceased to pay. The appellant was appointed receiver on the 5th day of February, 1896, a short time after the last payment made by Woodruff. Up to this time Woodruff had paid in all \$660 upon the bond and mortgage. The district court found that the loan was usurious, and had been paid in full, and canceled the mortgage, from which decree this appeal is taken.

At the time the loan was made there were no provisions in the statutes of Nebraska allowing foreign building and loan companies to do business in this state, hence the transaction must be governed by the same rules as apply to other cases of loans made and mortgages given to secure the same, and the peculiar character of the association as a mutual concern is no protection against the penalties imposed by the statute for the exaction of usurious interest.

The appellant concedes that if the rule announced in *Anselme v. American Savings & Loan Ass'n*, 66 Neb. 520, is adhered to in this action, the appellant is not entitled to recover the amount he claims is still due and unpaid, and asks us to overrule the doctrine of that case, citing numerous authorities in his brief.

The first opinion filed in the *Anselme* case was in line with the rule contended for by the appellant. *Anselme v. American Savings & Loan Ass'n*, 63 Neb. 525, but a rehearing was allowed and upon reargument and further consideration the rule announced in the later opinion was adopted. There is not an unanimity of mind in the courts of the several states as to the proper rule to apply in cases where a building and loan association becomes insolvent and seeks to foreclose on mortgages executed by borrowers. The authorities cited in the appellant's brief have failed to convince us that the rule laid down in the *Anselme* case is wrong. On the contrary we are satisfied with its correctness and it will be adhered to.

But appellant claims that even if the rule of the *Anselme* case is adhered to there is still a balance of \$80 due on the bond and mortgage. It appears that the appellee made 80 payments in all, the first 8 payments before

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the loan was received being of \$7 each, dues upon his 10 shares of stock, and after the loan was made he testifies he paid \$8.50 each month, \$6 as dues and \$2.50 as interest. The whole amount paid by him was \$660. Even if we allow the appellant the benefit of the 10 cents per share per month, which he claims was paid for expenses, which we do not decide he was entitled to, there was still an amount paid by appellee in excess of the amount received by him, and this, under the operation of the usury law, was all he was bound to repay.

The judgment of the district court should be affirmed.

AMES, C., concurs. OLDHAM, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRED M. HANS V. STATE OF NEBRASKA.

FILED JULY 13, 1904. No. 13,486.

1. **Criminal Law: INSTRUCTIONS.** Upon the trial of an indictment for murder in the second degree the defendant is entitled to a plain and correct statement from the court to the jury of the charge against him. An instruction purporting to state the offense for which he is being tried which omits material elements of the offense charged in the indictment is erroneous.
2. ———: ———: **SELF-DEFENSE.** When, in a trial for murder, the defendant produces evidence tending to justify the killing on the ground of self-defense, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous.

ERROR to the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Gurley & Woodrough and *A. W. Scattergood*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown*, contra.

SEDGWICK, J.

The defendant was tried in the district court for Brown county upon an indictment of the grand jury which charged him with the crime of murder in the second degree. In support of the charge, which contained the usual words, "but without premeditation and deliberation," the trial court, over the objection of the defendant, permitted evidence tending to show a conspiracy on the part of the defendant, with other persons, to murder the deceased, and also evidence of the doings and sayings, in the absence of the defendant, of his supposed conspirators; in other words he permitted the prosecution to try the case in all respects as though the defendant had been charged with deliberation and premeditation in committing the crime, and had entered into a conspiracy with divers other persons, the result of which was the murder for which he was being prosecuted.

The court also in instructing the jury stated to them the charge against the defendant upon which he was being tried, which charge purported to give the language of the indictment. It was first written upon a typewriter and contained the words "without deliberation and premeditation," found in the indictment. The court erased those words, thus expressly telling the jury that the defendant was charged with the crime of murder in the first degree, and withdrawing from the jury the information that the state had admitted in the most solemn form that the defendant had not used deliberation and premeditation, and therefore could not have conspired with others to commit the crime. Of course, such a conviction cannot be sustained. The defendant was entitled to have the jury plainly and correctly told the nature and legal effect of the charge that had been made against him upon which he was being tried, and this is especially true when the nature of the charge itself precluded the possibility of the existence of conditions peculiarly pre-

judicial to the defendant, conditions which the state strenuously insisted existed, and which the defendant strenuously denied.

Ordinarily competent evidence that tends to prove a material fact in issue is not rendered incompetent by the fact that it tends to prove more than is necessary to support the indictment, but this rule has no application in a case like this. The error in this proceeding is not predicated upon the proposition that, although the evidence tended to prove the malicious killing of the deceased, it was rendered incompetent simply because it tended likewise to prove deliberation and premeditation. In this case, the state solemnly admitted that there was no deliberation and premeditation, and this fact was not only purposely withdrawn from the jury, but the case was in all respects tried as though no such admission had been made.

In *State v. Boyle*, 28 Ia. 522, the indictment failed to charge deliberation. For that reason it was held insufficient as a charge of murder in the first degree. The trial court, however, considered it sufficient for that purpose, and tried the defendant upon that theory. The jury found the defendant guilty of murder in the second degree, which was sufficiently charged in the indictment. It was held that to try the defendant as though he were charged with murder in the first degree, when the indictment was insufficient for that purpose, was prejudicial to the defendant, and although he was convicted of murder in the second degree only, which was sufficiently charged, the judgment could not be sustained.

In so ruling the court followed and approved the case of *State v. Tweedy*, 11 Ia. 350. In that case the defendant was put upon trial for a crime of which he had been acquitted upon a former trial, and was convicted of a lesser crime, and the court held that the conviction could not stand, because of the fact that he was erroneously tried for the greater offense. These cases are not precisely in point here, but, for similar reasons, the error in

the proceedings in the present case is much more manifest.

2. The court instructed the jury: "Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack, there is reasonable ground to believe that there is a design to take his life, or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable, although it should afterwards appear that no injury was intended and no real danger existed." The vice of this instruction will be more apparent upon consideration of the condition of the evidence in this case. The defendant insisted that he had been deputized by the sheriff to arrest the deceased, and that he was at the time therefore in the "lawful pursuit of his business." The state as strenuously insisted that he was not properly deputized, that the attempted appointment by the sheriff gave him no authority whatever, and that he was therefore a trespasser and not in the lawful pursuit of his business. In this condition of the evidence, this instruction informed the jury that, if they should find that the defendant was not properly deputized, then they must find that he was not entitled to the right of self-defense, which clearly is not the law. A trespasser may defend himself against murder, and the fact that a man may be upon another man's premises, and that he may mistakenly suppose that he is acting lawfully, will not justify the taking of his life.

It is said that this instruction is approved in the case of *Coil v. State*, 62 Neb. 15. It is true that a similar instruction was given in that case and that the conviction was affirmed. Whether the rule announced in that case should be approved, or should be repudiated, is not now the question, as this case is clearly distinguishable. There was no question raised, in the case referred to, as to whether the defendant was or was not in the lawful pursuit of his business at the time of the homicide, and there was possibly no danger that the jury might suppose

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that the defendant was placed in a position where he had no right to avail himself of the law of self-defense. The question here discussed was not insisted upon. And again, there was in the instruction given in that case a plain, comprehensive and correct statement of the defendant's right of self-defense under the particular circumstances disclosed by the evidence. In the case at bar the court gave further and more particular instructions as to the right of self-defense under the facts in evidence, but that right was made to depend upon the defendant's having actually arrested the deceased immediately before the killing, which was a disputed question, and the court refused a requested instruction which correctly stated the law.

3. Many other errors are assigned in the petition in error in this case, but as there must be a new trial, it is not thought advisable to discuss them.

For the reasons above given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HOLCOMB, C. J., dissenting.

I am of the opinion that the charge of the court fairly stated the material elements of the offense, for the commission of which the accused was indicted, and that the jury could not possibly have been misled, nor the defendant prejudiced by reason of its failure in its first instruction to reiterate the words found in the indictment, wherein after charging an unlawful and malicious killing there is added: "but without premeditation and deliberation." There is nothing in the transcript indicating any erasures in the instruction, although defendant's counsel in their briefs say such is the fact. I do not, however, regard this as in anywise material nor as affecting the question under consideration. If instructions are to be condemned because of erasures or interlineations, then

but few would stand the test if rigorously applied. The real question is whether the instructions as given are prejudicial to the substantial rights of the accused. The indictment charged that the killing was done unlawfully, purposely and maliciously, but without premeditation and deliberation, and this was the basis of the prosecution and of which defendant and the jury were fully informed. The phrase "but without premeditation and deliberation" was certainly not such a solemn admission as would preclude the admission of any evidence tending to prove the crime charged, even though such evidence may have also had a tendency to establish murder in the first degree. The most that can be said is that the indictment, as returned, charged murder in the second degree and negatived a charge of the higher crime. Under the indictment, the defendant, on the evidence, could not be found guilty of a greater crime than murder in the second degree. This is all he was tried for and what he was found guilty of. The Iowa cases are not in point, because in each of them the accused was attempted to be charged and was tried for a crime for which a verdict of guilty could not be legally returned and sustained under the indictments. In these cases the defendants were compelled to, and did, defend in a prosecution for crimes of which they were not legally charged. Manifestly such proceedings are erroneous, even though a verdict of guilty of a lower crime and one which is sufficiently charged be the result of the trial.

The question, as it seems to me, resolves itself into one of whether, when one crime is distinctly and legally charged and the person is being prosecuted for it, evidence may be introduced which, while tending to prove the crime charged or some essential ingredient thereof, may also tend to prove another crime of which he is not charged, and the authorities, so far as my examination extended, are unanimous that such may be done. *Hope v. People*, 83 N. Y. 418, 427; *State v. Folwell*, 14 Kan. 105, 109; *State v. Adams*, 20 Kan. 311, 319. Any evidence tending

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to show that the accused conspired with others to kill the deceased, or which is connected with, or has a bearing on the acts resulting in the alleged killing and which tends to prove plans, methods, or arrangements entered into, with a view to the commission of the crime charged, are certainly material for the purpose of showing that a malicious killing was consummated, even though the tendency of such evidence may also be to prove that there was premeditation and deliberation.

In the first paragraph of the instructions given the jury, it is said the indictment charges in substance that the accused did unlawfully, purposely, feloniously and maliciously kill the deceased. In the second paragraph, section 4 of the criminal code is quoted wherein it is declared: "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." In instruction 4 the jury were told that the indictment charges the defendant with the crime of murder in the second degree, which is a violation of section 4 of the criminal code which has been set out in paragraph 2 of the instructions. By paragraph 6 the jury were told that the following material facts were necessary in order to constitute the crime of murder in the second degree: First, the time and place as charged; and second, that the killing was done purposely, unlawfully, feloniously and maliciously. With these instructions before the jury, I cannot conceive how the defendant could have been prejudiced, how the jury could have been confused, or how it can be said that material elements of the offense charged are omitted in the instructions. The failure to use the statutory phrase "but without deliberation and premeditation" is not, as I view it, an omission of an essential element necessary to constitute murder in the second degree. The words are used in the statute for the purpose only of differentiating between the lesser and greater crime. If deliberation and premeditation is charged, it constitutes murder in the first degree; and if omitted, the

offense charged cannot be greater than murder in the second degree. To charge murder in the second degree by charging the essential elements—malice, purpose and unlawful intent—and thereafter to add the phrase “but without premeditation and deliberation,” is but to amplify the charge and adds no essential ingredient to the crime. Murder in the second degree is included in every charge of murder in the first, and the crime exists whether there is or is not premeditation and deliberation. I am of the opinion, therefore, that the instructions of the trial court cannot rightfully be condemned for the reasons given in the majority opinion.

The instruction regarding the law of self-defense is of approved form and has been in general use in the trial courts of this state for many years. It is, I think, undoubtedly the law, and rests upon sound principles in criminal jurisprudence. Of course, the instruction when given must be applicable to the evidence in the particular case. It is approved in *Hoy v. State*, 69 Neb. 516; *Coil v. State*, 62 Neb. 15; *Carleton v. State*, 43 Neb. 373. The principle to be deduced from the instruction is recognized and given expression in *West v. State*, 59 Ind. 113; *Parker v. State*, 55 Miss. 414, and *Kennedy v. Commonwealth*, 14 Bush (Ky.), 340. The rule is stated in Bishop, Criminal Law, sec. 865, thus:

“If one who is assaulted, * * * being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable.” And in 1 McClain, Criminal Law, sec. 311, it is said:

“One who is not in fault, and is in a place where he has a right to be, may, without retreating, resist an attack which reasonably appears to imperil his life or threaten him grievous bodily harm, and take the life of the aggressor if necessary.”

It seems to me manifestly an unsound doctrine to hold that a trespasser, or one who by his own fault and wrongdoing invites resistance to his unlawful acts, may avail

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himself of the law of self-defense to the same extent as one who in the peaceful pursuits of his legitimate business is unlawfully attacked by another. The instruction given is strictly applicable to the evidence in the case. Had the court assumed that the accused was a trespasser and given a proper instruction as to his right to avail himself of the law of self-defense, under such circumstances he would have been here complaining, and with good right to complain, because his case was not submitted by instructions fairly applicable to the evidence introduced in the case. It is the theory of the defense that, while serving a legal process for the arrest of the deceased, he was suddenly assaulted by the deceased with a gun in such a manner as to induce in him a reasonable belief that his life was in imminent peril and that the deceased was killed in resisting such attack and purely in self-defense. In this view of the case, the instruction was altogether appropriate and in response to the defendant's evidence introduced on the subject. On the other hand, the state sought to show that the use of the process and the alleged effort to arrest the deceased was simply a ruse and subterfuge and a pretext resorted to for the purpose of shielding the defendant from the consequences of the commission of a heinous crime. Whether or not the process under which the defendant claimed he was acting invested him with legal authority to make an arrest was wholly immaterial save as it threw light on the contentions of the respective parties. No question of resisting of unlawful arrest was in the case. There is no evidence in the record tending to prove that an illegal arrest was resisted by the deceased because of its illegality, or that the authority, or lack of it, by the defendant to make an arrest in any manner contributed to the causes which led to the commission of the homicide. If, according to the defendant's theory, he was endeavoring to arrest the deceased and in good faith to execute the process in his hands, and while so doing was assaulted by the deceased in the manner testified to, then the killing

was justified even though, as an abstract legal proposition, the process under which he acted was not such as to constitute him for the time being a special officer, legally authorized to make the arrest. On the other hand, if the use of the process was only for the purpose of shielding him from the consequences of the crime, no arrest in fact being attempted, and he killed the deceased without provocation or justification, as is contended by the prosecution, then the question of the legality of the authorization of the defendant as a special officer to serve the process becomes wholly material. The issue of fact which the jury was called to pass upon was whether the accused shot the deceased purposely, wilfully and maliciously, or whether the homicide was committed in resistance to an assault made by the deceased on the accused, of such a character as to lead him to believe that his life was in imminent peril or great bodily harm threatened. The question here being considered is, I think, fully covered by the instructions of the court to the jury, wherein, after stating what is required to make a legal appointment of a deputy sheriff or to constitute a special officer for a particular purpose, it is stated:

“But you are further instructed that if you find that the defendant had no authority to arrest the deceased, David O. Luse, nevertheless, if you find that he did in truth and in fact arrest the deceased, and that said deceased submitted to such arrest, and subsequently took hold of a gun and turned it upon the defendant in a threatening manner, and in such a way as to make the defendant honestly believe that he was in imminent danger of losing his life, or of receiving great bodily harm, then the defendant under the law would have the right to even take the life of the said David O. Luse, if he honestly believed that the taking of the life of the said David O. Luse was necessary in order to save his own life or to prevent himself from receiving great bodily harm.” It is, therefore, apparent that the authority of the defendant to make the arrest, if he did undertake to

make one, became an immaterial question and could not have influenced the finding of the jury against him. The jury must have given him the benefit of the law of self-defense as though he was lawfully at the home of the deceased, but found against him on the ground that the killing was wilful, wanton and malicious and without legal justification. Had the accused desired more specific instructions than those given, or to fit some theory of the case regarding which there was competent evidence to support, it was his duty to have drafted a suitable instruction with the request that it be given with the general charge. It is manifest that an instruction on the theory that the accused was a trespasser and was unlawfully attempting to arrest the deceased and was seeking to avail himself of the right of self-defense under such circumstances would be more unfavorable to him than those given by the court on its own motion. The defendant could not invite by an unlawful act resistance from the deceased and then be permitted to avail himself of the law of self-defense to the same extent he would if he were not at fault. If he were in fact a trespasser, then it would have been his duty to decline to enter into the strife. The right of self-defense, it is true, would not be lost to him because he was the first wrongdoer, but it would be his duty to withdraw from the difficulty, if opportunity so to do occurred, and only resist the assault of the deceased without retreating, when it was of so sudden and perilous a nature as to afford no opportunity to decline and where he could not retreat with safety. It is only in the latter case that the greater wrong of the deadly assault is upon his opponent and which justifies him in slaying the assailant in self-defense. *People v. Hecker*, 109 Cal. 451. The rule of self-defense is found in the law of necessity. The plea of necessity is a shield only for those who are without fault in occasioning it and acting under it. No man can by his own lawless acts create a necessity for acting in self-defense and thereupon killing the person with whom he seeks the difficulty, interpose the plea of

self-defense. No doubt, a person may actually and *bona fide* withdraw from a strife of his own seeking and thereafter, if attacked, if he is without fault, resist the attack and avail himself of the plea of necessary self-defense. It is argued that *Hoy v. State, supra*, lays down a rule regarding self-defense contrary to the one given by the court in the case at bar. In this counsel are in error. It is true, it is there announced that the right of self-defense does not belong alone to persons engaged in their lawful business, and is available to every person regardless of the nature of his business who is assaulted, or who upon just grounds apprehends an immediate unlawful attack. The instruction does not limit the right of self-defense to those engaged in the lawful pursuits of their business. It declares only that such persons, that is, those without fault on their part and who are unlawfully attacked, may avail themselves of this defense to the fullest extent. Instead of condemning the instruction, the court approves it. The instruction is identical with the one under consideration. It is said in the opinion: "We do not condemn the instruction. When read in connection with the seventh paragraph of the charge it is probably not misleading." In that case, the evidence all conclusively established the fact that the assaulted parties were trespassing on lands of another, and it further appeared that they were endeavoring to escape when assaulted. Under such circumstances, the right of self-defense was available even though they were at the time engaged in such unlawful act. The instructions in that case, when considered together, were deemed to have properly submitted to the jury the question of self-defense. Regarding other alleged errors assigned as grounds of reversal, I have neither examined nor considered them, and can therefore express no opinion thereon. It would be productive of no good results for me alone to consider them. I cannot believe, from an examination of the record relative to the points considered in the majority opinion, that any substantial right of the

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accused has been disregarded or trampled upon, nor that, for the reasons given, he should be relieved of the punishment meted out to him by the trial court, and which, under the verdict of the jury and the evidence, he so richly deserves.

LOUIS D. HOLMES V. WILLIAM T. SEAMAN ET AL.*

FILED JULY 13, 1904. No. 13,407.

1. **Trial: ESTOPPEL.** A party is estopped to complain of a ruling of the trial court made at his request.
2. **Covenants: ACTION FOR BREACH: PAROL EVIDENCE.** In an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, the defendant is not concluded by a recital of consideration in the instrument, but the real consideration may be proved by parol.
3. **Measure of Damages.** It seems that in such an action, growing out of an exchange of lands, the measure of damages is the value of the property to which the plaintiff was entitled, but which he failed to receive, in the transaction.
4. **Justice of the Peace: JURISDICTION.** A justice of the peace has jurisdiction of such an action when the damages do not exceed the same, and the title to land is not drawn in question.

ERROR to the district court for Douglas county: WIL-
LARD W. SLABAUGH, JUDGE. *Affirmed.*

Louis D. Holmes, pro se.

Baldrige & De Bord, contra.

AMES, C.

For an expressed consideration of \$6,000, the defendant, William T. Seaman, conveyed to the plaintiff Holmes an improved Omaha city lot, by a deed of general warranty subject to a mortgage lien for \$2,500, which the grantee assumed and agreed to pay. In full payment of the pur-

* Rehearing allowed. See opinion, p. 304, *post*.

chase price, Holmes at the same time conveyed to Seaman 13 outlying lots, known as "Baker Addition" lots, subject to a mortgage lien on 9 of them to secure the personal obligation of Holmes, which Seaman, by a stipulation in the deed, assumed and agreed to pay and which he afterwards did pay and cause to be satisfied and discharged. Holmes went immediately into possession of the city lot, but has never paid any part of the mortgage debt thereon, and some years subsequently he was evicted by a judicial sale of the premises under a prior incumbrance.

This is an action for damages by Holmes against Seaman for a breach of the covenant for quiet enjoyment contained in the deed by the latter of the city lot. The other defendant is the wife of Seaman, who joined in the last mentioned deed for the sole purpose of releasing dower and who is not bound by its covenants. The answer admits the eviction and there is no issue in the pleadings, or conflict in the evidence, as to any of the foregoing facts.

The sole controversy at the trial was with respect to the measure of the plaintiff's damages. The defendant offered to prove the value of the city lot, for the purpose of showing that it was no greater than the amount of the incumbrance thereon, assumed by his grantee in the deed conveying it, but the plaintiff objected and his objection was sustained by the court on the ground that the true rule of damages is that announced by this court in *Cheney v. Straube*, 35 Neb. 521, namely, the purchase price and interest, there having been no costs or expenses incurred by the covenantee in resisting eviction. The defendant then undertook to show, and did show to the satisfaction of the jury, and, we think, by a preponderance of the evidence, that the value of the Baker addition lots was not greater than the mortgage debt and incumbrance on a part of them, which he assumed and agreed to pay, and did pay, pursuant to his covenant in the deed by which he acquired them.

Upon the issues and evidence thus presented the court submitted the case to the jury by a series of instructions,

to none of which the plaintiff took an exception, and a verdict was returned for nominal damages only, and from a judgment thereon this proceeding is prosecuted.

In this court, the plaintiff contends that the defendant is not entitled to dispute the recital of consideration contained in his deed conveying the city lot, especially because the transaction was an exchange of property, and that in such cases the parties are finally and conclusively bound by the estimate of values which they have, at the time of the trade, put upon their respective properties, or, alternatively it is said that the deed, by which the Baker addition lots were conveyed, recites a consideration of \$4,650 which, after deducting the amount of the incumbrances thereon, assumed and paid by the defendant, leaves a clear balance of \$3,500, which, with interest, the plaintiff is entitled to recover.

In support of the first branch of this contention, the plaintiff cites no authority, and we understand him to have abandoned it in his reply or supplemental brief. In that document, he argues that although the real consideration in the defendant's deed could have been inquired into under proper issues, such an inquiry is not proper in this case, because the answer denies that there was any consideration, which the recital estops the defendant to do, instead of pleading the real consideration which would have been permissible. With respect to this matter, it must suffice to say, that we do not so understand the pleading. Both the petition and answer set forth the transaction in great detail and are supplemented, in this respect, by the reply, so that the entire controversy was before the court for such disposition of it as the law required, in view of all the facts out of which it arose. In connection with this argument the plaintiff cites 2 Sutherland, Damages (2d ed.), sec. 575: When there is an exchange of land, the rule of ascertaining the damages seems to be that the plaintiff is entitled to recover the value of the lands he was to receive from the defendant. We are satisfied with this rule, and so, as we understand, would

have been the defendant, had the testimony he offered tending to prove such value not been excluded by the plaintiff's objection. The plaintiff can, of course, not now be heard to contend that the ruling of the court sustaining his objection was erroneous.

In support of the second branch of his contention, namely, that the recital in the deed of the addition lots is conclusive, he cites the apparently somewhat inconsiderate decision of the supreme court of Iowa in *Williamson v. Test*, 24 Ia. 138. This decision is in conflict with the rule above quoted from 2 Sutherland, Damages, and, we think, with the great weight of authority and the better reason.

Complaint is made because the court excluded a printed price list of the Baker addition lots, by which the defendant offered them for sale after he had acquired them, but the defendant admitted on the witness stand that he held the lots and offered them for sale at the time mentioned at prices identical with those named in the list, so that it does not appear that the plaintiff was prejudiced by the exclusion.

The court taxed the plaintiff with his own costs because the recovery was within the jurisdiction of a justice of the peace. There was no issue in the pleadings or evidence drawing in question the title to lands, and the action was for damages for the breach of a personal covenant. *Norral v. Zinsmaster*, 57 Neb. 158; *Hesser v. Johnson*, 57 Neb. 155.

We are unable to discover reversible error in the record, and recommend that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be

AFFIRMED.

The following opinion on rehearing was filed December 21, 1904. *Former opinion modified:*

1. **Justice of the Peace: JURISDICTION.** A justice of the peace has no jurisdiction of an action to recover damages for a breach of a covenant for quiet enjoyment in a deed conveying real estate, where such breach consists of an eviction by one having a paramount title.
2. **Opinion Modified.** Paragraph four of the syllabus to our former opinion herein, *ante*, p. 300, overruled, and the opinion is modified to conform to the rule above stated.

BARNES, J.

This case is before us on a motion for a rehearing, and, after an examination of the brief in support thereof, we are satisfied that our former opinion, *ante*, p. 300, should be adhered to, except as to the matter of the taxation of costs. On that question an oral argument was ordered, which has been made, and is supplemented by additional briefs. It appears that the plaintiff commenced this action in the district court for Douglas county to recover damages for a breach of the general covenants of warranty contained in a deed conveying real estate. The amount sued for was \$5,000, but the recovery was less than \$200. The trial court, for that reason, held that the case should have been commenced before a justice of the peace and, under the provisions of section 621 of the code, taxed all of the costs to the plaintiff. A motion to retax was filed, which was overruled, exceptions were taken and the matter properly presented to this court. In our former opinion, we held that a justice of the peace had jurisdiction of the subject of the action, and we are now asked to reverse that holding. We have frequently decided, that a justice has jurisdiction in an action for a breach of covenant against incumbrances, because such covenant is personal; it does not run with the land, and is broken as soon as made. The question of title neither arises nor can it be drawn in question in such a case. *Brass v. Vandecar*, 70

Neb. 35; *Hesser v. Johnson*, 57 Neb. 155; *Campbell v. McClure*, 45 Neb. 608; *Merrill v. Suing*, 66 Neb. 404.

This, however, was an action to recover damages for a breach of covenants for quiet enjoyment, and presents an entirely different question. In order to recover, as was stated in *Merrill v. Suing*, *supra*, it was necessary for the plaintiff to allege and prove the conveyance with the covenants of warranty, the breach thereof, and that he had been turned out of the possession of the granted premises, or some part thereof, or compelled to yield possession to one having a paramount title. So it is clear, that in this action, from the pleading itself, the question of title to real estate was involved, or at least might have been drawn in question. By section 907 of the code, it is provided:

"Justices shall not have cognizance of any action: *First*—To recover damages for an assault, or assault and battery. *Second*—In any action for malicious prosecution. *Third*—In actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this title. *Fourth*—In actions for slander, verbal or written. *Fifth*—In actions on contracts for real estate. *Sixth*—In actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for trespass on real estate, which are provided for in this title."

By this statute, the legislature has expressly prohibited justices of the peace from taking jurisdiction of cases like the one at bar. The defendant contends, however, that it is the amount recovered which alone determines the question of jurisdiction. In this counsel are mistaken. It is true, that a justice has jurisdiction where the amount involved is not more than \$200 in all actions except those named in the section of the statute above quoted. But in cases which fall within such exceptions, he has no jurisdiction of the subject of the action, no matter what amount is sued for or recovered. In cases where the question of jurisdiction is determined solely by the amount sought to be recovered, it may be well said, that the plaintiff is bound

to know, at least approximately, the amount he is entitled to, or will recover. In such a case, he has the power to chose his own forum, and must do so at his peril. If he sues for more than \$200 and recovers less than that sum, having brought his action in the district court, he cannot recover costs. But in an action like the one at bar, where the title to real estate is, or may be, drawn in question, he is not required to anticipate the course which may be pursued by the defendant, but must bring his action in a court which will have jurisdiction, no matter what defense is interposed. The fact that the defendant may not raise the question of title does not, in such cases, determine the question of jurisdiction. If the defendant's contention is correct he could, where such an action is brought before a justice of the peace, raise the question of title and oust the court of jurisdiction, and when sued again in the district court could change his defense, and by reducing the amount of recovery to less than \$200 compel the plaintiff to pay the costs necessarily incurred by him in order to redress his wrongs. We are not disposed to establish a rule which will, in effect, subject a plaintiff to the mere sport or whim of his adversary.

We are not aware that this question has been heretofore directly determined by this court, but in other jurisdictions, under statutes similar to ours, it has been held that where from the nature of the case, as disclosed by the plaintiff's pleading, he has reason to believe that the title to real estate will be brought in dispute, the action should be commenced in the district court, and the prevailing party will be entitled to his costs regardless of the amount of his recovery. 11 Cyc. 48; *Gay v. Hults*, 55 Mich. 327, 21 N. W. 357; *Kelly v. Manhattan Beach R. Co.*, 81 N. Y. 233.

We therefore hold that a justice of the peace has no jurisdiction of an action on general covenants of warranty for quiet enjoyment, like the one at bar; that the action was properly commenced in the district court, and plaintiff is entitled to recover his costs.

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For the foregoing reasons, the fourth paragraph of the syllabus to our former opinion is overruled, and the opinion itself is modified to conform to the rule announced herein. The order of the district court overruling the motion to retax the costs is reversed and the cause is remanded, with directions to the trial court to retax the costs in accordance with this opinion. In all other things the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HARVEY N. LINK V. SYLVESTER O. CAMPBELL.*

FILED JULY 13, 1904. No. 13,500.

1. **Instructions: ERROR.** An instruction which submits to the jury the affirmative of an issue which there is insufficient evidence to maintain is prejudicially erroneous.
2. **Trial: EVIDENCE.** A preponderance of evidence is all that is required to maintain an issue in a civil action.

ERROR to the district court for Antelope county: **JOHN F. BOYD, JUDGE.** *Reversed.*

Jackson & Williams and Roscoe Pound, for plaintiff in error.

Samuel J. Tuttle and William V. Allen, contra.

AMES, C.

Plaintiff and defendant are the owners, respectively, of adjoining governmental subdivisions, or tracts of land. There is no dispute about the title of either, but the divisional line between them is a section line, and the government surveyor's monuments at the corners of the sections have been effaced by time and the action of the elements, and the plaintiff, claiming that the defendant

* Rehearing allowed. See opinion, p. 310, *post*,

had encroached upon a strip of his tract lying along the section line, began this action in ejectment to recover possession.

The sole subject of the controversy is the location of the line and each party offered evidence in support of his contention, thus producing a sharp conflict in the evidence.

One of the instructions given, and excepted to, submitted to the jury the defense of 10 years' adverse possession which was pleaded in the answer, but which was admitted on the oral argument to be without sufficient support by the evidence.

Another instruction, also excepted to, advised the jury that the plaintiff "must recover, if at all, upon the strength of his own title to the property in controversy and that he cannot rely upon any alleged weakness or want of title in the defendant, and if the plaintiff has failed to prove his title and right of possession to the land in dispute by a fair preponderance of all the credible evidence, you must find for the defendant." There were a verdict and judgment for the defendant and the plaintiff prosecutes error.

We think that both of these instructions were erroneous. From the former of them the jury had a right to infer, and perhaps did infer, that there was evidence sufficient to support a finding of adverse possession, and for aught that we know to the contrary, their verdict may be founded upon that supposition. It seems to us very nearly self-evident, that an instruction submitting to a jury the affirmative of an issue which there is insufficient evidence to maintain, is prejudicially erroneous.

Eliminating the defense of limitations, as upon this record must necessarily be done, there is no question of title involved in the litigation. The sole controversy is about the definition of a boundary line and rights of possession dependent thereon. The latter of the foregoing instructions has no meaning applicable to this record, unless it is interpreted as requiring the plaintiff to es-

tablish his contention as to the location of the boundary line, with that degree of certainty which is required of a plaintiff in ejectment in proving his title when the latter is in dispute, and this requirement is emphasized by qualifying the word "preponderance" by the word "fair." It is true that in *Altschuler v. Coburn*, 38 Neb. 881, this court held that the use of the word "fair" in a like connection was not error, citing *Dunbar v. Briggs*, 18 Neb. 94, and showing quite distinctly that there is no practical difference between such use and a similar employment of the word "clear," which latter was condemned in *Scarch v. Miller*, 9 Neb. 26, and in *Marx & Kempner v. Kilpatrick*, 25 Neb. 107, and in several other cases. But these latter cited cases were not overruled. Neither were they overruled in *Dunbar v. Briggs*, *supra*, which is entirely consistent with them. It was there held that the use of the qualifying word "fair," in one instruction, was not reversible error, because the correct rule was stated in another instruction, and under the circumstances of the case it was evident that the jury could not have been misled. But there is no intimation of an intention to overrule or qualify the preceding opinions written by the same hand, nor any evidence of dissatisfaction with them. On the other hand, the writer indicates quite clearly that, in his opinion, the use of any expression requiring more than a mere preponderance of the evidence is erroneous, unless the vice is corrected by some other feature of the record. The logical deduction from the argument in the opinion in *Altschuler v. Coburn*, *supra*, is, therefore, the opposite of the conclusion at which the court arrived, and required a reversal instead of an affirmance of the judgment. In the case at bar the error under consideration is emphasized, rather than otherwise, by directing the attention of the jury, in the same instruction, to the abstract and irrelevant proposition of law that a plaintiff in ejectment whose title is in dispute must recover, if at all, upon the strength of his own title and not because of the weakness of that of his adversary.

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For these reasons, it is recommended that the judgment be reversed and the cause remanded for a new trial.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for a new trial.

REVERSED.

The following opinion on rehearing was filed October 5, 1905. *Judgment of district court affirmed:*

1. **Ejectment: GENERAL DENIAL: INSTRUCTIONS.** In an ejectment case, title by adverse possession may be proved under a general denial, and, when such title is one of the defenses relied upon by the defendant, he is entitled to have the jury instructed with reference to the same if any competent evidence has been introduced to support that issue, even though the evidence may be contradicted or may be considered insufficient by the jury.
2. ———: ———: ———. In an ejectment case, where the defendant's answer is a general denial, it is not error to instruct the jury that the plaintiff must recover, if at all, upon the strength of his own title to the property, and that he cannot rely upon the weakness of the defendant's title.
3. **Instructions.** The use in an instruction of the phrase "a fair preponderance of the evidence" criticised, but *held* not to be prejudicially erroneous.

LETTON, C.

The facts in this case are recited in the opinion filed at the former hearing, *ante*, p. 307. At the former hearing, the cause was reversed on account of the giving of two instructions, the first of which submitted to the jury the question of whether or not the defendant Campbell and his grantors had been in possession of the strip of land in controversy for 10 years prior to the time the action was begun. This instruction was held to be erroneous, mainly because it "was admitted on the oral argument to be without sufficient support by the evidence," and it is said that

an instruction submitting the affirmative of an issue which there is insufficient evidence to maintain is prejudicially erroneous. We have heretofore said: "Where there is any evidence to support an issue presented by a party to an action, he is entitled to have the jury instructed with reference to his theory of the case, if supported by competent evidence and presented by the pleadings." And this may be considered to be settled law in this jurisdiction. *Hancock & Walters v. Stout*, 28 Neb. 301; *Cunningham v. Fuller*, 35 Neb. 58; *Boice v. Palmer*, 55 Neb. 389; *Western Mattress Co. v. Ostergaard*, 71 Neb. 575.

A re-examination of the record shows that while the evidence is conflicting, a number of witnesses testified to the adverse holding of the tract of land in question for more than 10 years by defendant and his grantors. The force of this evidence is weakened by testimony upon the part of the plaintiff's witnesses, that for a part of the time rent was paid for the use of such land to the plaintiff, but the identity of the tract of land for which rent was paid with that claimed by the defendant is in dispute. The testimony of the defendant's witnesses if uncontradicted would have sustained a verdict based upon adverse possession and this is sufficient to justify the giving of the instruction. The weight and sufficiency of the testimony were for the jury. They may have disbelieved the testimony of one side and believed the other. It is true, that upon the first oral argument in this court, it was admitted by one of the counsel for defendant that the evidence was not very strong upon this branch of the case, but it was not conceded that the question was erroneously submitted. One of the theories upon which the case was tried was that the defendant and his grantors had occupied the premises for the statutory period, and he was entitled to have that question submitted to the jury.

As to instruction number two, requested by defendant, which is assigned as error, it is objected that the instruction so far as it advised the jury that the plaintiff must recover, if at all, upon the strength of his own title to

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the property, and that he cannot rely upon any alleged weakness of title in the defendant is erroneous, and it is argued that this is a dispute as to the boundary line and not as to a question of title. But the issue presented by the pleadings was as to the title to a certain strip of land containing about 18 acres. The plaintiff alleged ownership which the defendant denied. The plaintiff was required to establish his title to the same by competent proof of ownership, and if he had failed to do so, he could not recover in the action. At the trial he produced his muniments of title, but he was further required to show, that the particular tract in dispute was covered by the description in his paper title and he was in fact compelled to recover upon the strength of his own title to the property in controversy.

Objection is further made to the phrase "a fair preponderance of evidence" used in this instruction. The use of the expression "a fair preponderance of the evidence" has been repeatedly held by this court not to be reversible error. *Murray v. Burd*, 65 Neb. 427; *Dunbar v. Briggs*, 18 Neb. 94; *Marx & Kempner v. Kilpatrick*, 25 Neb. 107; *Altschuler v. Coburn*, 38 Neb. 881. We agree with the former opinion that the use of the qualifying word "fair" is inadvisable and not to be commended, but as the record stands in this case we cannot see wherein the jury were in anywise prejudiced thereby.

Instruction number eight, as to the weight to be given the original field notes, is complained of. Taken with the other instructions upon this point, we see no error therein. While perhaps its statements would not be sufficiently specific if standing alone, the instructions asked for by plaintiff, and given upon this branch of the case, supply what may be lacking in particularity.

Much the greater part of the evidence in the case, which consists of nearly 500 pages, is directed to the question of where the true original government corners upon the line between sections 15 and 16 were situated, and it is evident that this was considered the most important question in the case. We are satisfied that the attention of the jury

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to the determination of this question of fact, was in no wise prejudicially affected, either by these instructions or by the other matters complained of by plaintiff in error.

In the whole case, we find no error prejudicial to the plaintiff in error, and recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WESTERN FLY GUARD COMPANY ET AL., APPELLANTS, v.
PHILIP F. HODGES ET AL., APPELLEES.

FILED JULY 13, 1904. No. 13,600.

1. **Pledge: SUIT TO ENFORCE.** A pledge of money or negotiable paper in the hands of a third party to secure the payment of the purchase price of chattels upon an executory contract of sale vests in the vendor a lien upon or interest in the fund, which, upon performance of the contract by him, he may enforce by a suit in equity.
2. **Evidence examined, and held** to support the findings of fact and judgment of the trial court.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Doyle & Berge, for appellants.

Mockett & Polk and *Sawyer & Snell*, contra.

AMES, C.

Appellants were the owners of a patent for, and the manufacturers of, a device called a fly guard, which was designed to be attached to doors for the prevention of the ingress of flies when the former were in use. They entered into a written agreement with the appellees to sell and deliver to the latter, at a specified date, 1,000 of these

contrivances for a purchase price of \$500, to be paid on delivery, and the appellees, as a pledge for the performance of the contract on their part, deposited with the First National Bank of Lincoln, a promissory note against a third person, agreeing that it or its proceeds, in case of collection by the bank, should be turned over to the appellants in satisfaction of the purchase price upon performance of the contract by the latter. At the time the agreement was made the device was in an experimental stage, but a small model of it was exhibited with reference to which the contract was made, and there was, as the district court correctly found, an implied agreement that the fly guards to be delivered should conform thereto, or be equally as well adapted to accomplish the purpose intended. But certain castings entering into the structure of the model were made of brass, for which iron or steel was intended to be substituted in the manufacture of the guards for practical use, and it was found, upon the attempt being made, that it was difficult, or perhaps impossible, to make the substitution without changing the form of the castings in such manner as to seriously impair the efficiency of the device. At any rate, on the day specified by the parties for the delivery, appellants tendered to the appellees 1,000 of the guards as a compliance with the contract, but the latter refused to accept them on the ground, that by reason of the fact just mentioned, they were unsuitable for the purpose intended and were unsalable and without value. Thereupon this action was begun against the appellees and against the bank, as trustee or pledgee of the note and its proceeds, to compel the delivery thereof to the appellants pursuant to the contract. The bank filed an answer in the nature of interpleader and was permitted to retain the money to await the determination of the controversy between the parties claiming the fund, and to be discharged from the litigation.

Upon the trial the court made 10 special findings of fact, the last three of which are in the following language and

are in our opinion supported by a preponderance of the evidence:

"8. That at the time of making the contract between the parties herein the plaintiffs furnished to the defendants a certain model of the fly guards so to be manufactured and said model was delivered into the possession of the defendants, and the said defendants retained possession thereof producing the same at the trial of this cause, and there was an implied understanding and agreement between the parties that said fly guards were to be manufactured and constructed in accordance with said model, and that said guards would answer the purpose for which they were intended.

"9. That after the making of said agreement by the parties, the plaintiffs proceeded to the manufacture of such guards and the defendants assisted therein, making suggestions and assisting in experiments and attempting to make such guards out of other and different material other than the model as was first exhibited, in order that the same might be manufactured at less cost and thereby sold cheaper on the market. That said guards were not practicable in the manner in which they were made, and the device was only in the experimental stage and had not been useful or successful up to and including the times herein complained of and set forth in the issues between the parties herein.

"10. That the defendants gave notice to plaintiffs of the failure of said guards to perform the work and purposes for which they were intended and of the various defects therein and sought to aid the plaintiffs to perfect and make serviceable the said device, but that up to and including the time of the attempted delivery on the part of the plaintiffs to the defendants, the said device had not been perfected and made serviceable or useful for the purpose for which it was intended. That at the time of the making of such agreement and the depositing of the note in the First National Bank as herein described, the defendants relied upon the implied warranty that said de-

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vice was serviceable and sufficiently perfected in its manufacture as to enable defendants to procure purchasers therefor, and that upon the discovery of the imperfections of such device and the impracticability of the same, the defendants therefore refused to accept the same upon being tendered by the plaintiffs, and refused to execute the order to the First National Bank for the delivery of the note, or the proceeds collected thereon, to the plaintiffs."

As conclusions of law the court found, in substance, that the note and its proceeds are not a trust fund or pledge for the performance of the contract by the appellees and that the appellants, even in case of full compliance with the contract on their part, would have had no interest therein, or lien thereon, and no right of action in equity, but would have been limited to their suit at law for damages for breach of the contract. Thereupon there was a judgment for the defendants of dismissal and for costs from which this appeal is prosecuted. The contract and note were inclosed in an envelope and deposited with the bank at the same time, and a memorandum was indorsed on the envelope to the effect that the note or its proceeds was not to be delivered to the appellants except by the order of the vendees, and this latter circumstance seems to have been responsible for the conclusion of law by the court, but it ought to have been considered in connection with all its related circumstances, and it cannot be supposed to have been intended wholly to defeat the purpose and practical importance of the deposit.

We think that the conclusions of law are erroneous, but that the judgment is right. It was for the very purpose of avoiding the necessity of a resort to the law courts and reliance upon the pecuniary responsibility of the vendees, in event of a breach of the contract by the appellees, that the deposit was required to be made and was made. If appellants had not an interest in and a lien upon the deposit enforceable in equity, in case the purchase price had become payable by fulfilment of the contract, it might have been withdrawn by appellees at any time, and appellants

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deprived of their sole inducement for entering into the contract, and their sole security for the payment of the consideration money. But we are satisfied from an examination of the record that there was not such a performance of the contract by appellants as entitles them to recover and therefore recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CO., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

MARY P. LONERGAN ET AL., APPELLEES, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED JULY 13, 1904. No. 13,568.

Proof of Publication, by the affidavit of a person having knowledge of the fact, must be made within six months after the last day of publication.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

A. H. Murdock, for appellants.

Leffler & Winters, contra.

OLDHAM, C.

This is an action to restrain the collection of a special grading tax levied by the mayor and council of the city of South Omaha on certain lots situated in grading district No. 42, in the above named city. The material allegation of the petition is, that the tax is illegal and void because the petition was not signed by the requisite number of freeholders; because there was no sufficient

notice given by the city council of its intention to sit as a board of equalization prior to the levy of the taxes complained of; because there was no legal meeting of the board of equalization held prior to the levy of the taxes, and because chapter 15 of the session laws of 1891 and chapter 7 of the session laws of 1893, which authorized the levy, were unconstitutional. The city answered with a general denial and a plea of estoppel. On issues thus joined, there was a trial to the court, judgment for plaintiff, and defendants bring the case to this court on appeal.

At the trial in the court below, the learned district judge held that the petition for grading, at the expense of the owners of the property, was sufficient and an examination of the record leads us to the conclusion that this holding is fully supported. The court also held that there was no proof of a notice by publication of the meeting of the board of equalization before the levy of the tax against the property in the grading district. An examination of the record shows that plaintiffs, to support this allegation of their petition, introduced in evidence the record of the proceedings of the board which failed to show any notice by publication of the meeting. The defendant city introduced the following alleged proof of publication:

"J. M. Tanner, being duly sworn, says that he is one of the proprietors of the *Daily Tribune*, a newspaper of general circulation in said county and state, published in the city of South Omaha, Neb., and that the notice, a copy of which is hereto annexed, was published in said newspaper for six times commencing on the 8th day of May to the 15th day of May, inclusive, 1900. J. M. TANNER."

This proof was subscribed and sworn to on the 8th day of July, 1903.

The sufficiency of this proof is challenged because it fails to specifically show that the notice was published for six consecutive days immediately preceding the meeting of the board of equalization and also for the reason that it was sworn to on the 8th day of July, 1903, more than

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three years after the last publication. Section 403 of the code provides: "Publications required by law to be made in a newspaper, may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made, but such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication." It is apparent, that to entitle defendants to prove the publication in the newspaper by the affidavit of a person having knowledge of the fact, such affidavit must be made within six months of the last day of the publication. As this affidavit was the only proof offered by defendants, tending to show publication of the notice during the time required by the statute, we think the learned trial court was fully justified in finding that there was no sufficient proof of publication of notice of the meeting of the board of equalization, and, as such notice is jurisdictional, we need not examine into the question of the constitutionality of the statute under which the tax was sought to be levied.

We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARGARET GOMBERT ET AL., APPELLANTS, v. MARY J. LYON
ET AL., APPELLEES.

FILED JULY 13, 1904. No. 13,581.

1. **Occupying Claimant.** Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same. *Lothrop v. Michaelson*, 44 Neb. 633, followed and approved.
2. **Evidence examined, and held insufficient to sustain the trial court.**

APPEAL from the district court for Nuckolls county:
GEORGE W. STUBBS, JUDGE. *Reversed.*

J. H. Broady and Cole & Brown, for appellants.

L. C. Burr, contra.

OLDHAM, C.

This is a supplemental proceeding under the occupying claimant's act to determine the value of the improvements on a half section of land situated in Nuckolls county, Nebraska. The case was before this court on its merits and the title quieted in the appellants, in the case of *Lyon v. Gombert*, 63 Neb. 630. After the judgment of this court quieting the title in the present appellants, appellees filed a supplemental petition, asking in substance to have the value of the improvements placed on the premises determined under the provisions of the occupying claimant's act, chapter 63, Compiled Statutes (Annotated Statutes, 10259-10269). Proper orders were made by the district court on this application, appraisers were appointed as provided by the act, and returned the following findings:

"The undersigned appraisers respectfully report that in pursuance of the instructions of this court, we did on the 30th and 31st days of July, 1903, make the following appraisal as per your instructions in the above entitled cause:

200 acres of breaking on the north half of 14-3-8..	\$400.00
House on said land.....	60.00
Stable on said land.....	60.00
300 rods of wire fence on said land.....	50.00

Total improvements \$570.00

Net value of rents and profits under your order \$2,540.00

Less value of improvements above mentioned.. 570.00

Balance.....\$1,970.00

Value of said land in 1893, \$4,000.00.

Value of said land in 1903, \$7,500.00."

Objections were filed to this report by the appellees, for the reason, among other things, that the appraisers did not appraise and fix the amount the real estate was increased in value, by reason of the improvements placed upon said land by the objectors. The court overruled these objections and entered judgment on the findings of the appraisers without any other testimony being produced, and allowed the appellees a credit of \$3,500 for the increased value of the land between 1893 and 1903, as shown by the report of the appraisers, and to reverse this action the landowners have appealed the case to this court.

It is urged by the appellants that the occupying claimants are only entitled to the actual value of the improvements placed upon the land by them, and that this is the full measure of their recovery; that this court should, from the report of the appraisers, make a finding allowing the claimants \$570 as shown by the report of the appraisers, and charge them with rents and profits in the sum of \$2,540, and either render a judgment here, or direct a judgment to be rendered by the lower court on reversal, for \$1,970 in favor of appellants.

It is contended on the contrary by the appellees, that there is sufficient evidence in the report of the appraisers to uphold the judgment of the district court in awarding the occupants the \$3,500 as the increase in the value of the real estate, which was occasioned by their cultivation and improvement of the premises. We cannot fully agree with either of these contentions; for the rule is well established in this state, that "Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same." *Lothrop v. Michaelson*, 44 Neb. 633.

We think, under this rule, that the report of the appraisers should have been set aside, or that the court should have directed the appraisers to supplement their report with a finding not only as to the value of the land in

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its unimproved state, but as to its enhanced value, if any, by reason of the improvements erected thereon by the occupants. The report before us plainly indicates that the appraisers were attempting to fix the actual cost of the improvements placed on the land, and this, standing alone, is not sufficient evidence on which to make a finding as to the enhancement of the value of the land by reason of the improvements. They have also found, as they should have done, the value of the land in its unimproved condition in the year 1893, the time the action began, and they found the value of the land and improvements in the year 1903; but as to how much the value of the land has increased by reason of the general rise in land values in that county, and how much, if any, of its increased value is due to the improvements and cultivation of it by the occupant, we are without competent testimony before us to make a proper finding.

We therefore recommend that the judgment of the district court be reversed, and the cause remanded for further proceedings.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

MICHAEL LAMB V. PATRICK J. ROONEY ET AL.

FILED JULY 13, 1904. No. 13,601.

1. Election of Remedies. If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy. *Pekin Plow Co. v. Wilson*, 66 Neb. 115, followed and approved.

2. **Trusts, Enforcement of: EQUITY.** The conventional relation of trustee and *cestui que trust* or other fiduciary relation is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner. *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, followed and approved.

ERROR to the district court for Greeley county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

T. J. Doyle and H. C. Vail, for plaintiff in error.

James R. Swain and Abbott & O'Malley, contra.

OLDHAM, C.

The facts underlying this controversy are, that on the 22d day of April, 1902, Harry Hill and Verne Stewart stole and drove away from a herd of cattle owned by plaintiffs, 10 head of steers which they delivered to defendant Michael Lamb, who intermingled the stolen cattle with 15 head of his own and shipped the same to South Omaha, Nebraska, where they were sold to the commission firm of Ralston & Fonda, the proceeds of sale amounting to \$1,800; \$830 of the proceeds of the sale of this carload of cattle were invested in 49 head of yearling steers by defendant Lamb, and the cattle purchased were shipped to his ranch in Greeley county, Nebraska. Subsequently the defendant Lamb was arrested on a criminal warrant and charged with aiding and abetting the larceny of the cattle and with receiving the stolen cattle, knowing the same to have been stolen. He was convicted of this criminal charge in the district court for Greeley county, Nebraska, and sentenced to the penitentiary for a term of nine years. The judgment of the district court was subsequently affirmed by the court in the case of *Lamb v. State*, 69 Neb. 212. Shortly after the larceny of plaintiff's cattle they began an action against the defendant Lamb to recover the value of the stolen cattle and procured an attachment to issue and levied the same upon the cattle now in dis-

pute. Subsequently, the attachment proceeding was dismissed by plaintiff and the instant case, a bill in equity to impose a resulting trust on the 49 head of cattle purchased from the proceeds of the sale of the cattle stolen from plaintiffs, was instituted. Issues were properly joined on the petition in the court below, and a trial had to the court, which resulted in a judgment for plaintiffs and a decree quieting title to the 49 head of cattle in dispute in plaintiffs. From this judgment and decree, the defendant brings error to this court.

The first contention urged for a reversal of the cause is, that the plaintiffs by instituting suit against the defendant to recover the value of the property stolen, and having an attachment issued, elected to treat the cattle as the property of the defendant, and that, having so elected, they are now estopped by this act from claiming the equitable title to the cattle in dispute. There are two sufficient answers to this contention: The first is, that by instituting a suit at law against the defendant for the recovery of the value of the cattle alleged to have been stolen, plaintiffs by this act did not elect to declare that the defendant was the owner of any particular property. Nor did they by this act disaffirm their title to the property stolen by the defendant, nor their right to trace the proceeds of such property when reinvested and have a trust declared therein. And again it clearly appears from the testimony that at the time the attachment proceeding was instituted, plaintiffs had no knowledge of the fact that the 49 head of cattle now in dispute had been purchased from the proceeds of the sale of their cattle. In *Pekin Plow Co. v. Wilson*, 66 Neb. 115, this court said that, "If in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy."

The next question urged is, as to the sufficiency of the

testimony to impress a resulting trust in favor of plaintiffs on the cattle in dispute. The evidence as to the larceny of the cattle and defendant Lamb's participation therein was the same in the case at bar as it was in the criminal proceeding, and we may say that, in full compliance with all rules of evidence, this fact has been fully established. That a thief who steals the property of another and changes its form by reinvestment is a trustee *ex maleficio* of the owner of the property is well established in this state, and as was said by Post, C. J., in *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, "The conventional relation of trustee and *cestui que trust*, or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner."

Then the question to be determined is, how much, if any, of the proceeds of the cattle stolen from plaintiffs have been traced by the testimony in the record to the purchase of the cattle in dispute? The evidence shows that before the theft of the cattle the defendant had a small balance of about \$76 in the Spaulding State Bank; that after the sale of the car-load of cattle at South Omaha defendant deposited in this bank a draft on the Packers National Bank of South Omaha for \$1,589.92; that from the moneys so deposited in the Spaulding bank he purchased a draft of \$555.93 which was applied as payment of a part of the purchase price of the cattle in dispute. The evidence shows that the 10 head of plaintiff's cattle, which were intermixed with the 15 head of defendant's cattle, were of the value of about \$850 and that the draft for \$1,589.92 was part of the proceeds of the sale of all those cattle. This is all the evidence in the record which tends to trace the proceeds of plaintiff's cattle into the purchase of the herd in controversy. It seems to us, in view of this state of the record, that the learned trial court went too far with his decree in declaring plaintiffs the absolute owners of the property in dispute. Plaintiffs voluntarily abandoned a court of law for the redress of their civil

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wrong and sought the assistance of a court of chancery, which always abhors forfeitures and penalties. Having thus selected a forum of conscience for relief, although in a contest with a convicted felon, they are only entitled to such a decree as equity provides, which is to have a resulting trust declared in the property in controversy, to the extent that they have traced the proceeds of the sale of their property to the chattels in dispute.

We therefore recommend that the judgment of the district court be reversed, and that the cause be remanded with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of \$555.93, with seven per cent. interest from May 1, 1902, and to declare this trust a first lien on the property in dispute and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within 20 days from the entry of judgment.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with direction to the court below to impress a trust in favor of plaintiffs on the property in dispute for the sum of \$555.93, with 7 per cent. interest from May 1, 1902; and to declare this trust a first lien on the property in dispute, and to enter a proper decree directing the sale of the property, unless the amount of this lien be paid within 20 days from the entry of judgment.

JUDGMENT ACCORDINGLY.

CITY OF OMAHA V. MARY HOULIHAN.

FILED JULY 13, 1904. No. 13,464.

1. **Personal Injury: QUESTION FOR JURY.** Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the

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evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established.

2. **Pleading and Proof.** Proof as to the distance of the surface of the sidewalk from the ground and the slope of the ground at the end of the walk, held to be within the issues.

ERROR to the district court for Douglas county: **JACOB FAWCETT, JUDGE.** *Affirmed.*

C. C. Wright and W. H. Herdman, for plaintiff in error.

James H. McIntosh, contra.

LETTON, C.

This action was brought by Mary Houlihan, defendant in error, hereinafter styled the plaintiff, against the city of Omaha, plaintiff in error, hereinafter styled the defendant, to recover damages for personal injuries alleged to have been suffered by her by reason of a defective sidewalk in said city. The plaintiff, at the time of the accident, was an unmarried woman, about 50 years of age, who had been engaged in domestic service for 10 or 12 years previously, and was a stout healthy woman weighing about 170 pounds. She was injured at a point where a wooden sidewalk running on the west side of 24th street between Cuming and Burt streets intersects the alley on the west side of the street. The evidence shows that the sidewalk is made of two-inch planks laid crosswise on four-by-four stringers; that at the point where the sidewalk reaches the alley there is no crosswalk and that the middle of the alley is about 16 to 18 inches below the level of the surface of the sidewalk; that immediately at the end of the walk upon which the plaintiff was walking the distance from the surface of the sidewalk to the ground is from eight to ten inches, and that from that point there is quite a steep slope for the remainder of the distance to the level of the middle of the alleyway. The plaintiff was familiar with the locality;

she testifies that the sidewalk was clear and all right at the place; that as she was proceeding along the walk in the direction of Cuming street she stepped down from the surface of the plank walk to the ground, when her foot slipped and she fell backward upon her other foot in such a manner that the bones of her leg were broken just above the ankle. It appears that after the bones were set by the surgeons she employed, a plaster cast was placed upon the injured member and she was compelled to remain in bed for about nine weeks; that afterwards she was obliged to use crutches for a long period of time and was still to some extent incapacitated from labor by the injury received. She recovered a judgment in the district court from which the defendant city prosecutes error.

The principal contention of the defendant is that the verdict is not sustained by sufficient evidence, is contrary to law and that the court erred in refusing to direct a verdict for the defendant. The argument of the defendant is mainly devoted to two points. First, that the plaintiff was clearly guilty of contributory negligence since she was acquainted with the condition of the walk at the point where the injury occurred and that she with full knowledge of this defective condition attempted to pass over the dangerous spot. That the danger was well known to her and that she having deliberately attempted the passage must be taken to have assumed the risk.

The first question to be considered is whether or not the plaintiff knowing the condition of the walk when she made the descent was guilty of contributory negligence in attempting to pass. Certain photographs were introduced in evidence which show clearly the condition of the sidewalk and "the vertical cut-off," of which the plaintiff complains, at the time of the accident. The plaintiff testifies that she did not see any ice or snow when she fell, if there was any it must have been covered with dust; while the testimony of Dr. Upjohn, the doctor who was called to her at the time of the accident, was that there was a small piece of ice about four inches from the end

of the sidewalk, occupying about eight inches of the center of the walk, and that a person could have stepped to one side of the ice had they taken the pains. He further testified that the plaintiff told him that she had fallen there when she was running for the car, that she noticed the car standing and she was running to catch the car and stepped on the ice and fell. The plaintiff denies that she told the doctor that she was running; but her testimony as to whether she said she stepped upon the ice is that she told him she stepped out in the alley and fell; that she does not believe she told the doctor she stepped on the ice, she could not say, that it might be icy, but that she did not see it, it must be because of the dust. The witness Johnson testified that at the time of the accident he looked to see if there was ice there and there was none.

The evidence showed that the sidewalk upon the other side of the street was not in good condition. The photographs show that the middle of the street was rough and frozen and also show a steep bank at the edge of the sidewalk next the street higher than the step from the sidewalk to the alley. Under these circumstances we believe that a person of ordinary prudence would be justified in stepping down from the end of the walk a distance of eight to ten inches, which is not an unusually high step. Had the condition of the ground beyond been level, in all probability no injury would have resulted, but doubtless owing to the sharp slope beyond the first step down, the plaintiff's foot slipped and she fell.

We are convinced from the evidence that the proximate cause of the injury was the abrupt descent from the surface of the sidewalk to the level of the alley. There was a vertical descent of from eight to ten inches, then a sloping descent for about the same distance. Had the sidewalk been constructed so as to leave no abrupt descent the accident in all probability would not have happened. It is probable that a small part of the surface of the slope was icy but was covered with dust, since the plaintiff testifies that she did not see any ice when she stepped down,

and it is not at all improbable that the fall of the plaintiff to the ground brushed the dust away and made the ice visible. Although the plaintiff was well acquainted with the condition of the sidewalk at this point, her knowledge would not prevent her recovery in this action, provided that she used ordinary and reasonable care considering all the circumstances at the time she was injured. *Union P. R. Co. v. Evans*, 52 Neb. 50. There is no clear and satisfactory evidence of the intervention of any other agency causing the plaintiff to slip, than the defective and improper situation and construction of the end of the sidewalk so that it was left elevated such a height above the alleyway, and the nature of the ground at the bottom of the step.

The question of whether or not the plaintiff was negligent was submitted to the jury by appropriate instructions, and the jury found against the defendant on this issue. The question of contributory negligence becomes a matter of law for the consideration of the court only when the inference to be deduced from the testimony is so clear and positive that reasonable minds could not well differ, but where persons of ordinary good judgment might reasonably differ in the conclusion drawn from the facts as to whether or not a person has been guilty of contributory negligence, it is a matter entirely for the jury to determine. In this case, the court cannot say as a matter of law that the plaintiff was guilty of contributory negligence and the matter was properly submitted to the jury.

The defendant's second contention is that the negligence of which the plaintiff complains was not the proximate cause of the injury, but that the injury was caused, not by the defective condition of the sidewalk but by the lack of a cross-walk across the alley, or by the accumulation of ice or snow at the point of crossing and that hence the evidence does not support the allegations of the petition. The petition charges "that said sidewalk as so constructed and maintained by said defendant is, and during all the times herein mentioned, was dangerous to foot passengers;

that during the winter season ice, snow and mud accumulate on the ground at the bottom of said vertical cut-off, so that passengers walking along said sidewalk, and stepping down said vertical cut-off were in great danger of slipping and falling and sustaining injuries thereby; that said defendant was negligent in constructing and maintaining said sidewalk with said vertical cut-off in manner and form as aforesaid, and the said danger to foot passengers by reason thereof was at all times well known to the said defendant." While it is true that the petition does not describe the precise nature and every element of the defect that caused the accident, it sufficiently appears that it was the distance between the surface of the walk and the ground, and the uneven condition of the surface of the ground at the foot of the step that was complained of. No motion to make the petition more specific was filed and we think its allegations broad enough to admit of the proofs furnished.

A number of objections are urged to the instructions of the court, but we are satisfied that the instructions given fairly submit the issues to the jury. It is objected that the court erred in instructing the jury that the life expectancy of the plaintiff was 21.11 years. The parties stipulated that, according to the Carlisle table of expectancy of life, the prospective life of a person of the age of 50 is 21.11 years when in good health. There was no other evidence as to expectancy. The evidence shows that the plaintiff was in good health at the time of the accident. It is true that the Carlisle table of expectancy is not conclusive of the question of the probable duration of life of an individual, but is merely a matter of evidence to be taken into consideration by the jury the same as other evidence and that in some cases an instruction of this kind might be prejudicial; but in the case at bar the evidence was undisputed. The only effect that the introduction of this table could have would be to affect the amount of the plaintiff's damages. The defendant does not complain that the damages are excessive, and even if it did there

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would be no ground for the complaint. The action of the court was not prejudicial.

The case was fairly tried and submitted to the jury, and we find no error in the record prejudicial to the defendant.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EDWARD NELSON V. J. R. WEBSTER, SHERIFF, ET AL.

FILED JULY 13, 1904. No. 13,576.

1. **Judgment: PRINCIPAL AND SURETY.** A defendant, who had been found to be a surety by the judgment in the original action upon a promissory note, paid the amount of the judgment and took an assignment of it to himself for the purpose of enforcing it against his principal. *Held*, That, as between the parties, the judgment had not been satisfied and extinguished, and that the surety was entitled to collect the same by the issue of execution against his principal.
2. ———: **CONCLUSIVENESS.** Where in an action against a principal and surety, that issue has been presented and a finding made under section 511 of the code, the relation of the parties as principal and surety has been conclusively determined, and need not be relitigated in an action to subrogate the surety to the rights of the creditor against the principal.

ERROR to the district court for Saunders county:
BENJAMIN F. GOOD, JUDGE. *Affirmed*.

John H. Barry, for plaintiff in error.

V. L. Hawthorne, contra.

LETTON, C.

This is an action of replevin brought by Edward Nelson, plaintiff in error as plaintiff, against J. R. Webster, Sheriff of Saunders county, and Peter Johnson, defendants in error as defendants, in the district court for Saunders county. The case was tried to the court upon an agreed stipulation of facts which are substantially as follows: That on March 29, 1897, the Farmers & Merchants Bank recovered a judgment against Friberg, Nelson and Johnson in the sum of \$154.25 and costs taxed at \$11.55 upon a promissory note signed by said parties; that the evidence, findings and judgment of the court show that Peter Johnson signed the note as surety; that afterwards Peter Johnson paid the full amount due upon the judgment of the plaintiff by his attorney, S. H. Sornborger, and the following record was made upon the court docket upon which the judgment appears:

"April 8, 1897. In consideration of the payment of \$163.81 by Peter Johnson, surety of the plaintiff, this judgment as against Andrew Friberg and Edward Nelson is hereby assigned and set over to said Peter Johnson to proceed herein in plaintiff's name or otherwise against said Friberg and Nelson but not at plaintiff's costs. Farmers & Merchants Bank, by S. H. Sornborger, its attorney." That a transcript of the judgment and assignment was filed in the district court for Saunders county and an execution issued thereon, by virtue of which execution the defendant Webster as sheriff seized the property described in plaintiff's petition which is of the value of \$690; that Peter Johnson, the defendant, caused the execution to issue claiming to own the judgment by virtue of having paid the same and receiving the assignment thereof. Upon the pleadings and evidence, judgment was rendered for the defendant, and the plaintiff prosecutes error to this court.

The plaintiff in error contends, first, that Johnson, having paid and satisfied the judgment, it was extinguished and no longer remained a valid judgment against any one;

second, that one of several judgment defendants cannot become the assignee of the judgment, as against the other defendants.

It is admitted by the plaintiff in error that had Johnson, after paying the judgment, filed his petition containing the proper averments in a court having jurisdiction against Nelson and Friberg, his codefendants, had brought them into court and sustained the allegations of his petition with proper proof, he would have been subrogated to the rights of the bank. But it is contended that he cannot summarily acquire the right to enforce the judgment against his codefendants, and determine his rights and the rights of Nelson without giving Nelson his constitutional right to be heard in his own defense. The defendants in error upon the other hand contend that the fact that Johnson was only a surety is *res adjudicata*, that payment to the bank and the assignment of the judgment to him operate as a transfer of the judgment, and that thereby he was subrogated to all the rights and remedies possessed by the bank at that time, and can enforce the judgment as to his principal as fully as the bank could have done. In the original action in the county court, issues were tendered upon the question of whether the relation of principal and surety existed as between Johnson and his codefendants; evidence was taken and a finding and judgment was had upon such issue, which determined as between the parties the fact that Johnson was merely a surety. So that the status of the parties as principal and surety was conclusively determined before the payment of the judgment and its assignment to Johnson took place.

By section 511 of the code it is provided that "in all cases where judgment is rendered in a court of record within this state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their codefendant, it shall be the duty of the clerk of said

court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail." By the provisions of this section, the question of whether the parties stand in the relation of principal and surety may be as effectually litigated and settled in the original action, as could be done under the common law in a subsequent action in which the surety sought exoneration. One of the principal objects, therefore, of the surety's suit had been realized by the adjudication in the original suit that Johnson stood in the relation of surety to his codefendants.

It is further established that the surety has paid the judgment creditor the full amount of the judgment and costs and obtained an assignment thereof. Under the pleadings in this case no issue is tendered that could be litigated in an action for exoneration, other than the allegation in the reply that Nelson was only a surety upon the obligation and not a principal, but this issue as we have seen has been adjudicated and settled as between these parties.

Under the civil law not only is the surety entitled where he pays the whole debt to the benefit of all the collateral securities taken by the creditor, "but he is also entitled to be substituted, as to the very debt itself, to the creditor by way of cession or assignment. And upon such cession or assignment * * * the debt is, in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal." 1 Story, Equity Jurisprudence (13th ed.), section 500. And this it seems was the earlier doctrine at common law. See cases cited in 1 Story, Equity Jurisprudence (13th ed.), section 499. Mr. Story, however, states that the doctrine is now established, that the surety has no such right to be enforced in equity and that he cannot insist upon any assignment, upon the ground that by the payment of the debt the debt has become extinguished, but he comments upon this doctrine as follows:

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"It is observable that the whole of this reasoning proceeds upon the ground that by the payment by the surety the original debt is extinguished. Now that is precisely what the Roman law (as we shall presently see) denied; and it treated the transaction between the surety and the creditor according to the presumed intention of the parties to be not so much a payment as a sale of the debt. 1 Domat Civil Law, Book 3, tit. 1, sec. 6, art. 1; *post*, sec. 500 and secs. 635, 636, 637. It is not wonderful that courts of equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties as well as to the demands of justice, should have struggled to adopt it into the equity jurisprudence of England. The opposing doctrine is founded more on technical rules than on any solid reasoning founded in general equity. In truth courts of equity in many cases do adopt it and act upon it." (Sec. 499*d*.)

It will be observed that in the case at bar, the purpose and object of the usual action in equity, by which the surety seeks to be subrogated to the rights and remedies of the creditor, has been effectually accomplished by the assignment of the judgment. The object of the equitable action was to procure the right to the surety who had paid the debt, to have the advantage and benefit of every lien, claim or security which the original creditor had against the principal debtor. We think that the equitable doctrine of the civil law has become the doctrine of the majority of the American courts.

In *Townsend v. Whitney*, 75 N. Y. 425, the whole subject is examined and it is said, that it has not always been easy to define the cases in which subrogation could be had and the English authorities are not all consistent, and in that case it was held that where a judgment has been rendered upon the surrogate's decree against an administrator and the judgment has been paid by one of the sureties he may have the decree assigned to himself or to some one else for him and enforce it by attachment against the administrator.

In a leading case in New Hampshire, there is an extended discussion of the legal principles involved in this case in which the language used by the writer of the opinion is so apt that we quote from it at length. The court say, by Bell, J.:

"The general principle, that a surety is entitled in equity, to be subrogated to all the securities which the creditor holds against the principal, is everywhere admitted. (Citing cases.) So it is beyond question that the surety, paying the debt, may stipulate for an assignment of all the collateral securities of the creditor against the principal, and such assignment will be protected in courts of law, as well as in equity. (Citing cases.) It is equally clear, that the payment of a debt by any person who is liable to its payment is a discharge of it. It is thenceforward *functus officio*, and cannot be enforced against any person, who is liable to its payment in the same degree as the party paying. *United States v. Preston*, 4 Wash. (U. S. C. C.) 446. So payment of a judgment, or execution, by either of the judgment debtors, discharges the execution, and is a satisfaction of the judgment. (Citing cases.) And, as a general rule, the same result follows from a payment made by any other person; and any agreement made by the party making the payment with the creditor, that the execution shall not be discharged, or returned satisfied, in order that the party paying may collect upon it a part or the whole of the judgment debt from another of the judgment debtors, will be entirely nugatory. * * * But the rule, that a surety may take an assignment of any security for the payment of the debt, which is held by the creditor, unavoidably implies an exception to the general rule that payment of a debt by a codebtor discharges the other codebtors, whether the debt rests in contract merely, or is merged in a judgment. * * * We apprehend, therefore, that the rule, that payment by a codebtor discharges the debt, must be subject to this exception; if the codebtor, making the payment, is a surety, the debt will be holden undischarged, so far as

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is necessary to preserve and give effect to the collateral securities against the principal, assigned by the creditor to the surety, either voluntarily, or by a decree of a court of equity. * * * The payment, for most purposes, discharges the debt, but does not so discharge it, as to destroy the security of the surety; but a judgment may be entered up, to be levied on the property attached, or, if judgment be rendered, a levy on that property may be effectually made, though the execution would be enjoined, or set aside, if used for any other purpose." *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

The American cases on this subject are collected and distinguished in 24 Am. & Eng. Ency. Law (1st ed.), 204-206, and notes. See, also, *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 595; *Pott v. Nathans*, 1 Watts & Ser. (Pa.) 155, 37 Am. Dec. 456; *Scaring v. Berry*, 58 Ia. 20, 11 N. W. 708; *Bank of Montpelier v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640; *Mason v. Picron*, 63 Wis. 239, 23 N. W. 119; *Mitchell v. DeWitt*, 25 Tex. Supp. 180, 78 Am. Dec. 561.

The case at bar is easily distinguished from the cases of *Potvin v. Meyers*, 27 Neb. 749, and *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, cited by plaintiff in error. In each of these cases, the defendant who paid the judgment was apparently primarily liable for the debt and it was not ascertained by the judgment that he stood in the relation of surety to the principal debtor.

In *Wilson v. Burney*, 8 Neb. 39, the facts were that Humphrey Brothers had commenced an action against Horace Taylor, E. A. Berry and the defendant Burney, and recovered a judgment against Taylor as principal and Berry and Burney as sureties. An affidavit for garnishment was filed against the firm of Wilson & Phillips, summons issued thereon, the answer of the garnishees taken and an order made that the garnishees pay the sum of \$85 into court. After this order was made an execution was issued on the original judgment and the amount due thereon was paid by Burney, who took an assignment of the judgment to himself and brought an action under the

judgment against Wilson & Phillips as garnishees. Judgment was rendered in his favor and Wilson & Phillips prosecuted error. This court held, the opinion being written by Chief Justice MAXWELL:

"The principle is well settled that upon the payment of the debt by the surety, he is entitled to the securities held by the creditor against the principal debtor, and to stand in his shoes, and it can make no difference that the security is in the form of an order upon garnishees to pay money into court. It follows that the defendant, being entitled to be subrogated to the creditor's rights in the premises, the judgment of the court below must be affirmed."

The only difference in the facts between this case and the case at bar is that an order had been made upon the garnishees to pay the money into court before the surety took the assignment of the judgment, but this does not change the principle which is applicable.

Since the relation of principal and surety has been adjudicated and established between these parties, and since an assignment has been made of the judgment from the creditor to the surety, all that could be done in another action has already been performed. Laws are established for the purpose of affording a remedy where a person has suffered a wrong. It was the plaintiff in error's duty to pay the judgment to the bank. Failing this, if he is called upon by any other person to pay the debt, he has the right to have it conclusively established that the person now calling upon him for payment occupies such a position that if he pay the debt to him, he cannot be compelled to pay the debt again to the original creditor.

When the person seeking payment has conclusively shown that he was the surety, that he paid the full amount of the debt, and that the judgment against the defendant has been assigned to him, there is nothing further necessary to be proved to authorize him to compel payment. These facts may be established by a separate action in the nature of a suit in equity for subrogation, or suretyship

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may be shown, under the provisions of our statutes in the original action itself, and if the judgment is in fact assigned, the surety may enforce it. No good can result from compelling the defendant in error to maintain another suit. The plaintiff in error has had his day in court and should pay the debt without further litigation.

For these reasons the judgment of the district court is correct and should be affirmed.

OLDHAM, C., concurs. AMES, C., dissents.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM F. MALONEY ET AL. V. JOHNSON-MCLEAN COMPANY ET AL.

FILED JULY 13, 1904. No. 13,598.

1. **Appeal Bond: VALIDITY.** An appeal bond in an action for the foreclosure of a mechanic's lien, in which a personal judgment has been rendered against the obligors, which is conditioned that the appellants will pay all condemnation money, judgment and costs which may be found against him or them on the final determination of the cause in the supreme court, complies with the first subdivision of section 677 of the code, is based upon a sufficient consideration, and is valid.
2. **Judgment, Finality of.** The "condemnation money" mentioned in the conditions of a bond given under the first subdivision of section 677 of the code is "found against the defendant" when the judgment of the district court appealed from is affirmed by this court.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

G. W. Shields, for plaintiffs in error.

O. S. Lobingier and J. L. Kaley, contra.

LETTON, C.

This is an action upon an appeal bond. The original action was brought in the district court for Douglas county by the defendants in error to foreclose a mechanic's lien against William F. Maloney and Emma F. Maloney, plaintiffs in error. A judgment and decree was rendered therein against the plaintiffs in error, whereupon they filed an appeal bond, with themselves as principals and Hans Peterson as surety, which appeal bond was conditioned as follows:

"Now, therefore, the condition of this obligation is such, that if the said William F. Maloney and Emma F. Maloney shall prosecute said appeal without delay and pay all condemnation money, judgment and costs which may be found against them on final determination of the cause in the supreme court, then this obligation shall be null and void, otherwise to remain in full force and effect." The cause was appealed to this court and by it affirmed, *McHale v. Maloney*, 67 Neb. 532, and a mandate issued, directing the district court to carry the judgment into effect. In the case at bar, judgment was rendered in the district court in favor of the obligees in the bond. It is argued by the plaintiffs in error, first, that the appeal bond was not a statutory bond, did not supersede anything and was void for want of consideration; second, that the bond was conditioned to pay only such condemnation money, judgment and costs as should be rendered by and in the supreme court, while the supreme court did not render any judgment but simply affirmed the judgment of the lower court.

In the action to foreclose the mechanic's lien a personal judgment was rendered against the plaintiffs in error. At the same time the decree found that their interest in the premises was a leasehold interest, and ordered that in case the judgment was not paid within 20 days, an order of sale be issued to sell the leasehold interest and the buildings and improvements on the real estate to satisfy

the debt. Under the system of pleading and practice which has prevailed in this state for many years with reference to the foreclosure of mechanics' liens, a plaintiff may in the same action pray for and receive a personal judgment against a defendant for any amount found to be due him from said defendant upon the contract between them under which the labor or material was furnished, and may also have a finding and decree adjudicating the existence and validity of a mechanic's or laborer's lien upon the property described in the claim of lien filed, and in the petition, and an order of sale of the property on which the lien exists to satisfy the amount due upon the contract. The sale of the property upon which the lien exists does not cancel or extinguish the debt or the judgment, unless the proceeds of the same are sufficient to pay the debt in full; the defendant still remains liable to the plaintiff for any amount which may remain unpaid on the judgment after the application of the proceeds of the sale *pro tanto* upon the judgment, and the plaintiff may have execution therefor. *McHale v. Maloney, supra.*

The case of *Clapp v. Maxwell*, 13 Neb. 542, cited by plaintiff in error, is not in point in this case, since an action for the foreclosure of a mortgage and one for the foreclosure of a mechanic's lien differ in many respects in this state. That case merely decides that personal judgment cannot be rendered in the first instance in an action for the foreclosure of a mortgage.

The conditions of the bond under consideration are those prescribed by the statute in cases of personal judgments for the payment of money. Since the judgment was a personal judgment which directed the payment of money, a bond which is conditioned that the appellant will pay all condemnation money and costs which may be found against him or them on the final determination of the cause in the supreme court complies with the first subdivision of section 677 of the code, is based upon a sufficient consideration, and is valid.

As to the second contention of the plaintiffs in error, in

which they urge that no judgment was rendered against them in the supreme court and that consequently there is no breach of the condition, it is sufficient to say that by the words "condemnation money" is meant the damages which the party failing in an action is adjudged or condemned to pay. When the supreme court affirmed the judgment of the lower court, it "found" the condemnation money "against the defendant." It is true that the appeal in the supreme court was a trial *de novo*. But it was at the same time a review or re-examination of the decision of the district court upon the facts. When this court reaches the same conclusion upon appeal as the trial court, its practice is to affirm the judgment of the district court, which is in effect a finding and judgment against the same parties, to the same effect, as the findings and judgment of the district court. It is to be preferred that the records of the district court of each county show judgments against the persons residing therein, rather than the records of the supreme court. When the judgment of the district court awarding a money judgment against an individual is affirmed by this court the "condemnation money" is found against him, as contemplated by the language of the statute.

We find no error in the record and the judgment should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
SEPTEMBER TERM, 1904.

JOHN D. SMITH ET AL. V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,657.

1. **Information.** In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute. *Whitman v. State*, 17 Neb. 224.
2. ———: **SUFFICIENCY.** The court will give the words used in the information their ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld.
3. ———: ———. Whether allegations in an information charging an assault and an attempt to commit a robbery include the essential element of a felonious intent to rob, *quære*.
4. ———: ———. The allegations of the information set out in the opinion *held* sufficient to charge an assault with intent to commit a robbery, and to support a judgment of conviction of such an offense.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Affirmed*.

Martin Langdon and Dan J. Riley, for plaintiffs in error.

Frank N. Prout, Attorney General, and *Norris Brown*, *contra*.

HOLCOMB, C. J.

Plaintiffs in error, defendants in the court below, were informed against and convicted of the offense of an assault with the intent to commit a robbery. The sufficiency of the information to support a judgment of conviction is challenged on the ground that the intent with which the assault was committed is not sufficiently and specifically charged in the information. The charging portion of the information is "that on the 22d day of September, in the year of our Lord nineteen hundred and three, John D. Smith and James Gaughan, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there in and upon one Henry Herman unlawfully, feloniously, forcibly, and by violence did make an assault, and then and there with menaces, forcibly and with violence, feloniously did attempt to take from the person of the said Henry Herman, and against his will, thirty-five cents (35-100) in money, of the value of thirty-five cents (35-100), the personal property of the said Henry Herman, with the intent of them, the said John D. Smith and James Gaughan, then and there feloniously, forcibly and violently from the person of him, the said Henry Herman, against his will to steal, take and carry away said property; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It is argued that the gist of the offense sought to be charged consists in the intent with which the assault was committed; that such intent must be distinctly alleged and proved and that there is no intent whatever alleged as to the assault charged in the information in the case at bar. It is urged that the latter clause wherein it is charged after the alleged attempt at robbery that it was with the intent of the defendants "then and there feloniously, forcibly, and violently from the person of him the said Henry Herman, against his will to steal, take and

carry away said property" has no connection with the alleged assault, and that such intent as therein alleged cannot refer back and show the intent with which the alleged assault was committed. It is the well settled doctrine in this state, that in charging the commission of an offense in an indictment or information it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute. *Whitman v. State*, 17 Neb. 224; *Kirk v. Bowling*, 20 Neb. 263; *Hodgkins v. State*, 36 Neb. 160; *Wagner v. State*, 43 Neb. 1; *Bartley v. State*, 53 Neb. 310; *Carrall v. State*, 53 Neb. 431. Section 14 of the criminal code provides that, if any person shall assault another with intent to commit a robbery, every person so offending shall be imprisoned, etc. It is clear that the gravamen of the offense sought to be charged in the information in the case at bar is the intent of the accused to commit a robbery; that this intent is the very essence of the crime and must be charged explicitly. The allegation of intent cannot be aided by intendments. *O'Connor v. State*, 46 Neb. 165; *State v. Hughes*, 38 Neb. 366; *Smith v. State*, 21 Neb. 552. It is, however, the duty of the court to give the words used in the information the ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, then the information should be sustained.

It is insisted by the state the allegation that the defendants, at the time of the assault, attempted with menaces, forcibly, and with violence to take from the person therein mentioned, the money described, is in and of itself sufficient to charge an assault with intent to commit a robbery. The word attempt, it is argued, is broader and more comprehensive than the word intent and includes within its meaning the latter term; that in charging the attempt to take from the person named, forcibly and with violence, the property mentioned, it is charged that the defendants not only intended to commit a robbery but

also went further and endeavored to carry out and to execute the intent. Authority entitled to weight and respectful consideration is not found wanting in support of this view as to the force and effect of the allegation of an attempt to commit a robbery found in the information. In Bishop, Criminal Procedure, sec. 80, the author, quoting an expression found in an opinion of the supreme court of Alabama (*Prince v. State*, 35 Ala. 367), says:

"It seems impossible to doubt that the only distinction between an *intent* and an *attempt* to do a thing, is, that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution"; and it is then observed by Mr. Bishop: "Since, therefore, the word 'attempt' embraces the full meaning of 'intent,' with something more, it is not impossible the courts may hereafter hold it to be an admissible substitute in an indictment." The text in the authority quoted from is fully supported and borne out by the decisions of the court of criminal appeals of Texas, in *Atkinson v. State*, 34 Tex. Cr. App. 424, 30 S. W. 1064; *Runnells v. State*, 34 Tex. Cr. App. 431, 30 S. W. 1065. We prefer, however, not to rest our conclusion as to the sufficiency of the information in the case at bar on the construction of the allegation of attempted robbery to which we have adverted, but rather to hold to the view that the allegation of an assault with the intent to commit a robbery is sufficiently explicit and distinct in other language found in the information. A fair interpretation of the language used justifies the view that the averments found in the information charge that on the 22d of September in the year stated, and in the county and state mentioned, the defendants made an unlawful assault on the person of Henry Herman and that they then and there—that is, at the same time and place, and necessarily as a part of the same transaction—with menaces, forcibly and with violence, and feloniously attempted to take from the person of the said Herman against his will 35 cents, being the personal property of the said Herman, with the intent

then and there—that is, at the same time and place, and as a part of the same transaction—feloniously, forcibly and violently and against his will to take from the person of the said Herman and to steal and carry away said property. The assault, the attempt to rob, and the alleged intent to commit a robbery, are manifestly joined together as one transaction and involve an act or a series of acts with the felonious intent accompanying the same, all of which are connected and relate to the one transaction charged and complained of in the information. The acts charged and the evil intent as alleged combine and in point of time concur, and this in law charges the crime of an assault with intent to commit a robbery. The alleged attempt to commit the robbery, as charged, manifestly, under a familiar rule of law includes the lesser offense, to wit, the assault; and the conclusion, therefore, is fairly warrantable that the acts charged, that is, the attempt to commit a robbery, including the assault, were with the intent, as alleged, to by force and violence take from the person mentioned the money described, and this would constitute, if accomplished, the crime of robbery. The assault is undoubtedly specifically charged, and that it was with the intent to commit a robbery is as clearly inferable from a consideration of the language used in the charging part of the information as that an unlawful assault is properly alleged. The conclusion proper to be drawn from the allegations of the information is, that the defendants are distinctly charged with an assault with the intent to commit a robbery, and that it is sufficient to support the judgment of conviction pronounced against them.

It is further urged that the information is vulnerable to the objection of insufficiency in that it does not charge that the intended robbery was to be accomplished by violence but only with violence; that the words as used mean nothing more than that the act contemplated and complained of was to be accompanied with violence but not accomplished by violence, which it is said are not at all the same. The reasoning urged in support of this objection is quite

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ingenious but not convincing. Giving the words used their ordinary meaning, the only inference to be drawn therefrom is that the defendants made an unlawful assault with the intent to by force and violence commit a robbery. What is alleged is that the defendants intended to commit the crime of robbery in making the assault charged and that the instrumentalities to be used to accomplish the crime were force and violence to be exerted toward or against the person assaulted. The line of reasoning urged is altogether too subtle for practical purposes and its adoption would render the court's administration the means for escaping justice rather than for the promotion and enforcement of it.

The information being sufficient to support the judgment of conviction, the same should be affirmed, which is accordingly done.

AFFIRMED.

EUGENE L. FERGUSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,675.

1. **Cross-Examination of Witness.** "When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question." *Johnston v. Spencer*, 51 Neb. 198.
2. ———: **COLLATERAL FACTS.** "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea." *Johnston v. Spencer*, 51 Neb. 198.
3. **Accused as Witness.** In a criminal action, when an accused takes the witness stand in his own behalf, he is put in the position of an ordinary witness and subject to the rules governing the usual cross-examination.
4. ———: **CREDIBILITY.** The credibility of such a witness is to be determined and tested by the same principles that are applicable alike to all witnesses who testify in a case.

ERROR to the district court for Clay county: LESLIE G. HURD, JUDGE. Reversed.

William M. Clark, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown*,
contra.

HOLCOMB, C. J.

An information was filed in the district court for Clay county against the defendant, who appears in this court as plaintiff in error, consisting of two counts; the first charging him with a night-time burglary of a store building, with the intent to steal and with the stealing of certain property from the building alleged to have been burglarized, of a certain description and value as set forth in the information. In the second count, the defendant is charged with having received the property thus alleged to have been stolen, knowing the same to have been stolen. A trial upon the issue raised by a plea of not guilty resulted in a verdict in favor of the defendant on the first count and finding him guilty on the second. The burglary and larceny alleged were located in the town of Harvard in said county.

Several errors are complained of but we shall content ourselves with the discussion and consideration of one only; deeming a more extended review of the record unnecessary and unprofitable.

The defendant was a witness in his own behalf. In giving his testimony during his examination in chief, it developed that, at or about the time of the alleged crime, he was engaged in selling a patent self-wringing mop, the business being conducted by canvassing the different towns and homes throughout the county where the offense was alleged to have been committed. On cross-examination, the defendant was asked if he had not, at the time of the alleged offense, been engaged in other than the mop business and answered that he had sold some other things. On further cross-examination, it was developed that the witness had sold as a "side line," as he termed it, cream barom-

eters, and a few ladies' furs. He was then asked where he obtained these latter mentioned articles which he had sold and answered that he had received them from a brother at Pleasant Hill, Missouri. He was then asked if he had not sold one of the furs to a Mrs. Gordon residing in Clay county where the offense was alleged to have been committed, and answered that possibly he had. This is the substance of the cross-examination regarding the point referred to. After the defendant had rested, the prosecution was permitted over the defendant's objection to prove by the Mrs. Gordon mentioned, that she had purchased a fur collarette from the accused and that, at the time of the purchase, it had a paper tag attached showing the cost and selling price such as is used by merchants generally. The prosecution was then permitted to prove further by one Kemp, who was in the mercantile business at Fairmont, Nebraska, that the collarette purchased by Mrs. Gordon from the defendant was or had been a part of his stock of merchandise, and that the tag which was introduced in evidence was one used by him in his business, and the marks thereon were in his handwriting. This is the substance of the evidence permitted to be introduced by the state over defendant's objection, for the purpose, it seems, of contradicting his statements as to where he had obtained the furs he had testified to having and selling, and of impeaching his credibility as a witness. Touching this feature of the case, the court instructed the jury when the case was submitted to them for consideration as follows:

"The testimony that has been offered in this case with reference to other property in the possession of the defendant, other than that charged to have been feloniously taken from the Higgins Hardware Company, is to be considered by you for no other purpose and as having no other bearing upon your conclusions in this case save and except as affecting the credibility of the defendant E. L. Ferguson as a witness in his own behalf." In the twelfth instruction, among other things, it is further said:

"The credit of a witness depends largely upon two

things; that is, first, his ability to know what occurred, and his disposition for telling the truth."

It is earnestly urged on the part of the defendant, that error was committed to his prejudice by the admission of the impeaching testimony to which reference has been made, and the giving of the instruction which we have quoted at length. We are of the opinion that the evidence objected to, and the instruction complained of, both of which are related and may be considered together, do not conform to the principles governing the competency and admissibility of evidence, and was error prejudicial to the substantial rights of the defendant. While no evidence appears in the record tending to show that the furs which the defendant had been selling, or the one sold to Mrs. Gordon which was introduced in evidence, had been stolen, yet one can hardly escape the conviction from a reading of the record, notwithstanding the court's instruction, that the prosecution not only sought to show that the defendant had falsified in stating he had received these articles from his brother in Missouri, but also that he had come into possession of them by some questionable method. We may assume, however, that the instruction quoted limiting the scope of the evidence to the defendant's credibility as a witness, removed objections otherwise, and yet it is manifest that the controversy regarding where the defendant obtained the furs he was selling while prosecuting his other business was a collateral matter wholly immaterial to the real issue to be tried in the case. If that were an issue, then, in all fairness, the accused should have had an opportunity to procure the testimony of his brother in Missouri and probably other witnesses, to establish the truth of his version as to where he obtained these articles; and this but illustrates the wisdom of adhering to the issues fairly raised by the charge in the information and the plea of not guilty thereof. If an issue might be raised as to where the furs were obtained, a like issue might also be raised regarding where he obtained his cream barometers and his patent mop sticks, and by these side excursions

sight would be altogether lost of the question of his guilt of the crime charged in the information. Such inquiries into collateral matters would raise such a multiplicity of issues as to render litigation interminable, and could but have the effect of confusing the jury, who are the triers of fact, to such an extent as to prevent a fair and intelligent verdict on the real issues of fact in many of the cases submitted to them. Whether the defendant obtained the fur collarette from his brother in Missouri, or whether it was a part of the stock of merchandise of the witness Kemp, and secured by some undisclosed means from him, would in nowise throw any light upon the question of his having received the stolen property alleged in the information, knowing it to have been stolen. Whether he told the truth as to where he obtained these articles would, in a sense, affect his credibility as a witness, but not in a legal sense unless it was regarding a matter material to the main issue and to the facts which it is permissible to prove in establishing that issue. In *Johnston v. Spencer*, 51 Neb. 198, the rule is stated thus:

"When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question." In the same case it is held that "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea." See also *Davis v. State*, 51 Neb. 301, 340; *Myers v. State*, 51 Neb. 517, and *Zimmerman v. Kearney County Bank*, 57 Neb. 800. In an early case—*Smith v. State*, 5 Neb. 181—it is ruled that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his testimony. Stated another way, the rule is that, when a party on cross-examination asks a witness an immaterial or irrelevant question, he is concluded by the answer and will not be permitted to call a witness to contradict it. *McDuffie v. Bentley*, 27 Neb. 380.

The accused when he took the witness stand in his own behalf put himself in the position of an ordinary witness and was subject to the rules governing the usual cross-examination. His credibility as a witness was to be determined and tested by the same principles that are applicable alike to all witnesses who testify in a case. The rule seems to be universal to the effect that self-contradiction of a witness can be established by direct testimony of an opposite character only when the statements to be contradicted relate to a material fact in issue in the trial of the particular case. This is not saying that in the cross-examination itself a witness may not be interrogated as to facts or statements upon collateral matters, but only that his denial or his testimony in relation to such collateral matters will furnish no foundation for further testimony of an impeaching character on the point, unless the testimony sought to be impeached relates to facts and statements which are material to the issues. Applying the principles deducible from the authorities above cited to the facts as disclosed by the record in the case at bar, it becomes apparent that the method adopted by the prosecution and permitted by the court over the defendant's objections to impeach his credibility as a witness does not find support or sanction under the rules of evidence governing such questions, and it goes without saying that if these principles have been violated in this respect that the error committed was highly prejudicial to the defendant and calls for a reversal of the sentence of imprisonment pronounced against him on the verdict of guilty returned by the jury. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED.

MARY E. GANDY V. ESTATE OF WILLIAM C. BISSELL ET AL.

FILED SEPTEMBER 22, 1904. No. 13,359.

1. **Trial: EVIDENCE.** The evidence in this case is found to be sufficient to require the submission of the issue to the jury.
2. **Pleading: EVIDENCE.** A fraudulent alteration of the note sued upon may be shown under the general issue, and, when the whole evidence fairly raises the question, testimony tending to show that no such indebtedness as the one sued upon ever existed is competent upon the issue of alteration.
3. **Action on Note: EVIDENCE.** In an action upon a promissory note, the plaintiff's possession and production of the note at the trial is *prima facie* evidence of delivery and ownership.
4. —: **DELIVERY.** If the note when executed is by agreement of the parties delivered to a third person to be by him delivered to the payee upon the performance of a condition precedent, and the condition is performed after the death of the maker of the note, the delivery becomes complete by the performance of the condition.
5. —: **EVIDENCE.** When, in an action upon a promissory note, there is evidence tending to show that the note sued upon is not the genuine note of the defendant, it is competent to show the circumstances surrounding the parties at the time of the alleged execution of the note.

ERROR to the district court for Richardson county:
JOHN S. STULL, JUDGE. *Reversed.*

S. P. Davidson and Reavis & Reavis, for plaintiff in error.

C. Gillespie and Francis Martin, contra.

SEDGWICK, J.

The nature of this case is sufficiently stated in the former opinions of this court. In *Gandy v. Estate of Bissell*, 3 Neb. (Unof.) 47, a judgment of the district court for Richardson county in favor of the defendant estate was reversed for errors there pointed out. After another

trial in the district court, the case was again brought here, and a second judgment of the district court in favor of the defendant estate was affirmed. 5 Neb. (Unof.) 184. Upon rehearing and further argument we are convinced that the last judgment of the district court is also erroneous, and a new trial must be had.

1. The plaintiff insists that the court should have given a general instruction in her favor, but we are satisfied that the plaintiff was not entitled to such instruction for the reasons stated in the former opinion herein, and for other reasons that appear in the record. We are satisfied that the question of the sufficiency of the evidence in this case is preeminently one for the jury, and not a question for the court, and as there must be another trial, it is apparently unadvisable to state further reasons for this conclusion.

2. No doubt the evidence of the witness Hawley was competent. There was sufficient evidence before the jury to justify the conclusion that Mr. J. L. Gandy was either the real party in interest or had such control of the business of Mrs. Gandy that his admissions in regard to this note would be competent. His wife, Mary E. Gandy, took no part in transacting any of the business with Mr. Bissell. If she had any interest in the business whatever, she was content to leave the entire management thereof with her husband. There was evidence that Mr. Bissell had been told that the Gandys—that is, J. L. Gandy and his wife—claimed to hold a large demand against him. He therefore sought a settlement, and it was in pursuance of this desire of Mr. Bissell's that the Hawley settlement was made. Mr. Gandy knew this, and, although he was acting for his wife in all things as well as for himself, he completed a settlement with Mr. Bissell without mentioning the existence of this extraordinary claim. Not only so, but if Mr. Hawley's testimony is to be believed, Mr. Gandy assured him that all claims of both himself and wife were settled, and that his interest and authority were such that it was unnecessary to have Mrs. Gandy's signature to the receipt which was given as evidence of complete settlement.

Such evidence tends to show that at that time, at least, no such claim existed as the one now sued upon, and was competent for that purpose. There was no plea of payment or settlement of this particular claim, and such defense, of course, could not be available to the estate. This distinction should have been made clear to the jury in the court's instructions. It was competent to prove under the issues joined that no such claim as that sued for ever existed, and because the proof offered tended in that direction it was competent. The jury should have been informed of the fact that there was no allegation of payment or settlement of the claim, and that the evidence in question was not allowed for the purpose of proving such payment or settlement.

The third instruction asked by the plaintiff was an attempt to supply this necessary information to the jury, but was properly refused by the court because it contained the statement that if "the signature to the note in controversy is the genuine signature of William C. Bissell they will find for the plaintiff." This was not the law of the case, because under the issues formed, the signature might be genuine; in fact, it would seem from the evidence that the name signed to the note was the genuine signature of Bissell, and yet under the issues it was competent to prove that Mr. Bissell did not sign the note sued upon. If the note had been fraudulently changed and the amount raised after the signature of Mr. Bissell, it was a forgery and was no more the note of Mr. Bissell than if the signature itself had been forged and was not the genuine signature of Mr. Bissell. This defense may be made under the general issue. 3 Randolph, Commercial Paper (2d ed.), sec. 1783. There was evidence tending to show that Bissell had given small notes to plaintiff, and under all of the evidence it was for the jury to say whether the note sued upon was genuine. As well might the court have instructed the jury to find a verdict for the plaintiff as to have given this instruction as asked.

3. The third and fourth instructions given by the court

for the defense, we think, are clearly erroneous and require a reversal of the judgment. The plaintiff had possession of the note, produced it upon the trial and it was received in evidence. This made a *prima facie* case of due delivery of the note. The defense undertook to prove that the note was, in fact, not delivered to Gandy until after the death of Mr. Bissell. This evidence on the part of the defense was not very satisfactory, and tended likewise to prove that Mr. Bissell had made himself liable upon some kind of bond at Mr. Gandy's request, and that when the note in suit was executed, it was, by agreement between the parties, left in the hands of a third party until such time as Mr. Gandy should cause Mr. Bissell to be released from liability upon his account, and that after Mr. Bissell's death the bond upon which Mr. Bissell was liable for Mr. Gandy had been satisfied, and the note then delivered to Mr. Gandy by the holder thereof pursuant to the original agreement. This seems to be the only evidence offered to overcome the presumption of due delivery of the note, which arises from the fact of possession. In this condition of the evidence upon this point the four instructions, which are set out in the former opinion herein, were given in behalf of the defense.

In an early Massachusetts case, which may be said to be a leading case upon this point, it was said by Mr. Chief Justice Parsons:

"If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed—here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition." *Wheelwright v. Wheelwright*, 2 Mass. *447, 3 Am. Dec. 66; 6 Am. & Eng. Ency. Law (1st ed.), 870, 871.

The statement is repeated in these instructions that to constitute a delivery that would be recognized in the law, the note must have been delivered to Mr. Gandy by

Mr. Bissell in his lifetime, or by the duly appointed executor of his estate after his death. It is insisted that this proposition is technically correct and that a delivery in escrow, as indicated in the evidence above referred to, if the conditions afterwards were complied with by Mr. Gandy, would be, in the view of the law, a delivery by Mr. Bissell in his lifetime to Mr. Gandy, and so come technically within the language of the instructions; but there is nothing in the record to indicate that the jury understood this technical meaning to be intended by the court in these instructions. On the other hand, it seems very probable that from the repetition of this language, in the absence of any further explanation, the jury understood the court to mean that unless Mr. Bissell in person, or the executor of his estate after Mr. Bissell's death, manually delivered the note to Mr. Gandy, it was no delivery which the law would recognize. The jury should have been fully instructed upon the law of conditional delivery, which was not done, and we think that, in view of the circumstances under which these instructions were given, they were clearly erroneous.

4. It was maintained by the defense that Mr. Bissell was a well to do man, and that it was highly improbable that he should have been indebted to the plaintiff for so long a time. The evidence of the witness Wilson tended to show that it was necessary for Mr. Bissell to borrow money with which to pay his taxes in 1889. It seems to have been the contention of the plaintiff, and supported by some evidence, that the indebtedness for which the note in suit was given existed at that time. We think, therefore, the court erred in not allowing the jury to consider the evidence of the witness Wilson.

The judgment of the district court is reversed, and the cause remanded.

REVERSED.

ALFRED MOLINE V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,381.

1. **Constitutional Law.** Chapter 104 of the laws of 1899, amending section 125, chapter 58 of the criminal code of 1873, is valid, and not in conflict with section 11, article III of the constitution. The amendatory act is germane to the subject of the original section.
2. **Statutes: AMENDMENT.** The language of the section as amended fairly includes written instruments conveying the title to real estate to the one perpetrating the fraud, and thus securing the signature of a person or persons thereto.
3. **Information.** While the section as it now stands defines two offenses, to wit, obtaining money or property by means of fraud and false pretenses, and fraudulently disposing of property to defeat creditors, but one of these offenses is charged in the information, and it is not vulnerable to a motion to quash for duplicity.
4. —: **DEMURRER.** The information examined, and *held* sufficient in form and substance to resist a demurrer.
5. **Instructions** given by the court on his own motion examined and approved.
6. **Evidence** examined, and found sufficient to sustain the conviction and sentence herein.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Affirmed.*

W. P. Hall, J. L. McPheeley and H. M. Sinclair, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, *contra.*

BARNES, J.

An information was filed in the district court for Phelps county, against the plaintiff in error, by which it was attempted to charge him with a violation of the provisions of section 125 of the criminal code, by obtaining, through

fraud and false pretenses, the signatures of Frederick Krapf and his wife, Christina, to a certain warranty deed, an instrument in writing, conveying to him their farm described as follows: The southeast quarter of section 24, township 5 north of range 20 west of the 6th P. M., situated in Phelps county, Nebraska. A trial resulted in a verdict of guilty and a sentence thereon. The accused prosecuted error, and the judgment was reversed on account of the insufficiency of the information. *Moline v. State*, 67 Neb. 164. When the mandate was returned a new information was filed charging the same offense, but in more explicit terms, and which was sufficient in form and substance to comply with the rules of criminal pleading. A second trial resulted in another conviction, and the accused was sentenced to serve a term of two years and four months in the state penitentiary. He thereupon prosecuted error, and the case is again before us for determination.

1. It is strenuously urged that section 125 of the criminal code as it now appears in the Compiled Statutes, is unconstitutional and void. The original section, as found in the criminal code of 1873, reads as follows:

"If any person by false pretense or pretenses, shall obtain from any other person, any money, goods, merchandise, or effects, whatsoever, with intent to cheat and defraud such person of the same, or shall fraudulently make or transfer any bond, bill, deed of sale, gifts, grants, or other conveyances, to defeat his creditors of their just demands, such person so offending, shall be fined in any sum not exceeding five hundred dollars, or be imprisoned in the jail of the county, not exceeding ten days, or both, at the discretion of the court."

Several ineffectual attempts were made to amend this law, and finally the legislature, at its session in 1899 (Laws 1899, ch. 104), passed an act by which the section was made to read as follows:

"If any person by false pretense or pretenses shall obtain from any other person, corporation, association or partnership, any money, goods, merchandise, credit or effects

whatsoever with intent to cheat or defraud such person, corporation, association or partnership of the same, or shall sell, lease or transfer any void or pretended patent right, or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, or shall fraudulently make and transfer any bill, bond, deed of sale, benefit or grant or other conveyance to defraud his creditors of their just demands, or if he shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five (35) dollars, or upwards, such person so offending shall be imprisoned in the penitentiary not more than five (5) years nor less than one (1) year; but if the value of the property be less than thirty-five (35) dollars, the person so offending shall be fined in any sum not exceeding one hundred (100) dollars, or be imprisoned in the jail of the county not exceeding thirty (30) days and be liable to the party injured in the amount of damages sustained."

The information herein is founded on a violation of that part of the section inserted by the amendment, to wit:

"Or if he shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five (35) dollars or upwards, such person so offending shall be imprisoned in the penitentiary not more than five (5) years nor less than one (1) year."

And the contention is that this provision is void, because it is not embraced in the title of the amendatory act, and is not germane to the subject of the section amended.

It is conceded that the title of the act of 1873, establishing a criminal code, was broad enough to embrace section

125, as it now stands. This disposes of the question of the title, for it is a rule of general application that where the title to the original act is broad enough to embrace the amendment, the new matter inserted thereby, if germane to the act or section of the act amended, will be held valid. Cooley, *Constitutional Limitations* (5th ed.), *146, and note; *Brandon v. State*, 16 Ind. 197; *State v. Bowers*, 14 Ind. 195.

This brings us to the question as to whether the amendment is germane to the subject matter of the original section. It must be remembered that the subject of the section was fraud. By its enactment it was sought to prevent persons from obtaining money or property by means of fraud and false pretenses, and to prohibit persons from fraudulently disposing of, or conveying away their property for the purpose of defrauding their creditors. It has been amply demonstrated by experience, that the original section was not specific enough in its terms to embrace many of the transactions resorted to by dishonest and evilly disposed persons to fraudulently obtain the money, property and effects of their victims. And so, the legislature, to make the law more far-reaching and effective, adopted the amendment under consideration, which provides that to obtain, by means of fraud and false pretenses, the signature of a person to an instrument in writing by which property is conveyed to, or anything of value obtained by, the person perpetrating the fraud, is a violation of the act and punishable as therein provided. This provision is certainly germane to the subject of the original section; it is merely an amplification thereof. It is conceded that the whole matter as it now appears in the section as amended might have been included in the original section, and would have been embraced in the title to the act in which the section in question is found. It seems clear that the matter contained in the amendment is simply a description of fraudulent acts or transactions not embraced in the original section, and of the same nature, and is germane to the subject thereof. In

the case of *Perry v. Gross*, 25 Neb. 826, the title to the amendatory act in question was: "An act to amend section 214 of the criminal code, chapter 58 of the General Statutes of 1873." (Laws 1875, p. 2.)

The object of the original section was to prevent gambling. The title was held sufficient to authorize an amendment to the section giving the right to recover money or property lost in gambling, and that the amendment was germane to the subject of the original section. See also *Henry v. Ward*, 49 Neb. 392; *Larned v. Tiernan*, 110 Ill. 173; *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 872, and note; *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 96, and note. We therefore hold that section 125 of the criminal code, as amended, is valid, and is not in conflict with the provisions of section 11, article III of the constitution.

2. It was contended orally, at the hearing, that the language of the section is not comprehensive enough to include a deed like the one in question, and the maxim *Expressio unius est exclusio alterius* was invoked to sustain this contention. It seems clear that this rule should not be applied to the act in question. By enumerating certain instruments in writing, none of which conveys property, and then concluding with the words:

"Or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five (35) dollars or upwards."

The legislature must have intended to include deeds conveying real estate, and so understood the matter at the time the amendment was adopted. We therefore conclude that such deeds are fairly embraced by the language of section 125 in question.

3. It is further claimed that the trial court erred in overruling the defendant's motion to quash the information, because it charged two distinct and separate offenses,

viz., obtaining property by false pretenses, and obtaining signatures to a written instrument. It seems clear to us that the information charges but one offense. It is charged, in the information, that the defendant, by means of fraud and false pretenses, obtained the signatures of Frederick Krapf and wife to a certain warranty deed by which the title to their farm was conveyed to him, and that the value of the deed thus obtained and of the land conveyed was \$2,500. So we conclude that the information charges but one offense.

Under this head, it was further contended that the accused was charged with the independent and distinct offense of selling and conveying land without a title; or in other words a violation of section 127 of the criminal code. It is a sufficient answer to this contention to say that he was charged with a violation of the provisions of section 125, and was tried for that offense, and no other. It further appears, from the evidence, that he did not convey the Indiana land to the prosecuting witness, for the deed therefor was executed by one C. N. Miller, and not by the accused. It thus appears that a prosecution under section 127 would have failed for want of evidence to sustain it.

4. It is insisted that the trial court erred in overruling the defendant's demurrer to the information, for the reason that it was charged that the value of the deed in question was \$2,500, when in fact and in truth it was worth nothing, and the accused therefore obtained nothing by his fraudulent acts. We do not so view the question. The words of the statute (sec. 125, criminal code) are: "If the value of the property, or promissory note, or written instrument or credit, fraudulently obtained or conveyed as aforesaid," and it is evident that the legislature intended the word "value" to mean the amount of the liability expressed, assumed or incurred by means of the written instrument to which the signature was fraudulently obtained. It is true that at the common law a promissory note had no intrinsic value, and the same may be said of a deed or other instrument in writing. 1 Mc-

Claim, Criminal Law, sec. 543. But promissory notes and like instruments in writing are made the subjects of larceny by statute in this and many other states. And by the section in question, they are also made the subject of the crime of obtaining property by false pretenses. Therefore, the value of an instrument in writing, within the meaning of the statute, must be taken to be the amount of the liability expressed therein, or assumed thereby. The execution of a warranty deed necessarily includes covenants of title, and the liability of the grantor incurred thereunder may equal the consideration paid therefor, or incurred thereby, which also may be the full value of the land conveyed. *State v. Butler*, 47 Minn. 483, 50 N. W. 532. And this rule seems to be recognized in *Turner v. State*, 1 Ohio St. 421. For these reasons we hold that the demurrer was properly overruled.

Some stress is placed on the fact that the land was re-conveyed to Krapf after the information was filed and the accused placed on his trial. It is clear, however, that a reconveyance of the land constituted no bar to the prosecution.

5. Complaint is made of some of the instructions given to the jury by the court on his own motion. We have carefully examined these instructions, and find that they fairly state the law applicable to the facts in question herein. It seems clear from the record that the accused, by means of fraud and false pretenses, obtained the signatures of Frederick Krapf and his wife to the deed in question, as alleged in the information; that it is such an instrument in writing as is embraced by the letter and the spirit of section 125 of the criminal code; that it conveyed the land described therein to the accused; that the value of the deed in question within the meaning of the statute was more than \$35, to wit, \$2,500; and that the evidence is sufficient to sustain the conviction and sentence herein.

We find no reversible error in the record, and the judgment of the district court is therefore

AFFIRMED.

ALEXANDER BLAIR V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1904. No. 13,703.

Instructions to the jury must be based upon and applicable to the evidence; and where in the trial of a criminal case an instruction is given without any testimony to sustain it, and prejudice results thereby, a new trial will be granted.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

J. C. Engleman and W. E. Gantt, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

BARNES, J.

At the November, 1903, term of the district court for Cedar county, an information was filed against one Alexander Blair, charging him with the crime of murder in the first degree for the killing of one Cornelius Balliet. To this information the accused entered a plea of not guilty. He was thereupon tried, and found guilty of manslaughter. From a sentence of seven years in the state penitentiary he brings error.

It appears from the evidence that on Saturday the 15th day of August, 1903, Blair called at the home of Balliet in Cedar county, and in the evening accompanied the family to a neighbor's where they had a dance; that during the day the deceased had been to Yankton, South Dakota, accompanied by a step-son, and while on the way had fallen out of the buggy, striking on his head; that thereafter he complained of being sick at the stomach and of having pains in his head; that he partook very freely of intoxicants during the day, and to use the words of the witnesses, "Was as drunk as he could be and get around." He went with the others to the dance, and there drank

considerable beer; it being shown that he, together with the other persons present, drank four four-gallon kegs of that beverage. When the beer was all consumed Balliet, with his family, accompanied by Blair, returned home, it then being about three o'clock on the morning of the 16th instant. It clearly appears that the deceased was very much intoxicated, and that when in that condition he was extremely abusive and quarrelsome. For some reason, not disclosed by the record, on arriving at his home he became very angry with, and abusive towards Blair; calling him vile names and threatening him with violence. Thereupon the accused, who had retired, got up, put on his clothing and started to leave the house, when the deceased called him back, and for a short time seemed to be in a better humor. Blair then took off his shoes and was about to go to bed again when Balliet repeated his abuse and threats of violence. Blair again stated that he would go away, and put on his shoes for that purpose, when the deceased violently assaulted him, striking him with such force as to stagger him. The events which followed were detailed by one Charles Frost, the only eye-witness to the whole transaction, in substance as follows:

"When we came back from Heitman's place Alex (meaning the accused) went to bed with the boy, John Seiler. I also went to bed, but Balliet was out in the yard cursing. He cursed Alex and called him a s—— of a b——. Alex said to me, what is that Mr. Balliet said about me? Oh, nothing much said I; he says yes he did, I hear him and I am going away, and he got up and went out of doors. When he went out him and Balliet talked a few minutes and they come back in as good friends as could be, and he (meaning the defendant) sat down on the edge of the bed and started to pull off his shoes; then Balliet came in and went right by me and talked just as nice as anybody could for a few minutes, and then he commenced cursing again. Alex says, I am going if you are going to act that way. I am going down to Lee's, and he pulled his shoes right on again and started, and he almost got out when Balliet

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called him back, and says: Come back here, there is no use of going off mad that way. And Alex turned and came back and sat down on the edge of the bed and commenced to take off his shoes again. At that Balliet commenced cursing him again, and he hauled off and struck Alex, and Alex struck him and he went about two-thirds of the way back down, and as he raised up he come back at Alex with all his force and struck him; Alex fell back and Balliet fell on his face and struck the floor, and hollered 'help me ('harlie'; he never knew anything more; Alex did not have any instrument, just his naked hands."

It also appears that before the assault Balliet had said there was going to be trouble, and he wanted the witness Frost to help him. John Seiler who saw part of the transaction, testified in substance as follows:

"I was in bed asleep, and when my step-father (meaning the deceased) hollered for help I woke up, and I seen my father going for the floor; Alex was trying to hit him, and my uncle Charlie Frost was holding him."

It further appears that the deceased fell on his face striking the edge of some boards that were in the corner of the room; that he lay there until he was picked up and carried out of doors; that Blair helped to carry him out and went for the doctor, and in other ways rendered what assistance he could. No evidence was introduced showing or tending to show any previous difficulty between the accused and Balliet. It was not shown that any ill-will existed between them, and it was impossible for the medical experts to say whether the injuries found on the person of the deceased were caused by a blow or by the fall described by the witnesses. On the facts, as shown by the evidence, epitomized above, the court gave the jury, among others, the following instruction:

"No. 18. The jury is instructed, that a party charged with an unlawful killing of a human being cannot avail himself of the claim of necessary self-defense, if the necessity for such defense was brought on by his own deliberate, wrongful act. Therefore, if the jury believe, from the

evidence, that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased C. Balliet, for the purpose of wreaking vengeance upon him, or for accomplishing some unlawful purpose, or if the jury should find and believe from the evidence beyond a reasonable doubt that defendant killed the deceased at the time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation and revenge, then the defendant cannot avail himself of the law of self-defense."

The giving of this instruction is assigned as error. It clearly appears that the instruction is not supported by the evidence. There is nothing in the record which even remotely establishes or tends to establish a state of facts to which this instruction could apply. There was not a word of evidence introduced at the trial from which the jury might even infer that the accused had an unlawful purpose in view when he defended himself against the unprovoked attack of the deceased; or that in so doing he acted from a spirit of retaliation or revenge. It is a well settled rule that the instructions must be based on the evidence, and where an instruction has been given without any testimony to support it, and prejudice results thereby, it is reversible error. *Clark v. State*, 32 Neb. 246; *Curry v. State*, 4 Neb. 55; *Williams v. State*, 6 Neb. 334.

In *Walrath v. State*, 8 Neb. 80, it was said:

"Instructions to the jury must be based upon and be applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred."

This rule is approved in *Ballard v. State*, 19 Neb. 609, and *Morcarty v. State*, 46 Neb. 652. By the instruction complained of the jury must have been led to believe that there was some evidence from which they might find that in repelling the assault made on him by Balliet, the defendant had in view an unlawful purpose, and acted in a spirit of hatred and revenge. Without doubt the jury must have

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been prejudiced by this instruction, and the giving of it was reversible error.

The record contains many other assignments of error, some of which seem to require a reversal of the judgment, but it is unnecessary to consider them at this time. Neither is it proper or necessary to comment on the weight, character and effect of the evidence.

For the error committed by giving the instruction above quoted, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V.
WILLIAM SPORER, ADMINISTRATOR.

FILED SEPTEMBER 22, 1904. No. 13,811.

1. **Constitutional Law.** The act of 1901 amending section 592 of the code, limiting the time for commencing proceedings to reverse, vacate or modify judgments or final orders, is valid and not in conflict with section 11, article III of the constitution.
2. **Proceeding in Error.** The filing of a petition in error and the transcript of a judgment sought to be reviewed in this court after the expiration of six months from the rendition of such judgment gives this court no jurisdiction.
3. ———. The reasons given for failing to commence the proceeding in error herein within the time limited by the statute examined and held insufficient.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Dismissed.*

Samuel Chapman, M. A. Low and W. F. Evans, for plaintiff in error.

H. D. Travis, Jesse L. Root and William Deles Dernier, contra.

BARNES, J.

This case is before us on an objection to our jurisdiction. It appears that one William Sporer, as administrator of

the estate of Henry J. Hennings, deceased, commenced this action in the district court for Cass county against the Chicago, Rock Island & Pacific Railway Company to recover damages to the next of kin of the deceased, whose death, it was alleged, was caused by the wrongful act of the defendant company. A trial resulted in a verdict and judgment for the plaintiff, and the company prosecuted error. It further appears that the judgment of the district court was rendered on the 2d day of December, 1903, and the transcript and petition in error were filed in this court on the 18th day of June, 1904. It is thus clearly shown that more than six months had elapsed from the rendition of the judgment to the commencement of the proceedings in error herein, and this is the ground on which the defendant in error challenges our jurisdiction.

Section 592 of the code, as it stood before the amendment of 1901, provided that proceedings in error should be commenced within one year from the date of the rendition of the judgment in the district court, and by the amendment above mentioned the time within which such proceedings should be commenced was reduced to six months. The defendant company, in order to avoid the consequences of its delay and sustain the jurisdiction of this court, contends that the amendment of 1901 was unconstitutional and void, for the reason that the subject of the bill amending the original section is not clearly expressed in the title, as is required by section 11, article III of the constitution, which provides:

"No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

In determining this question we must keep in mind that it is the duty of this court to uphold the acts of the legislature, unless they clearly violate some constitutional provision. The object of the provision above quoted is to prevent incorporating into a bill before the legislature pro-

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visions which have no connection with its general object, and of which the title gives no indication. *White v. City of Lincoln*, 5 Neb. 505. The title of the act in question in this case is:

"An act to amend section 592 of the code of civil procedure, Compiled Statutes of Nebraska for 1899, and to repeal said original section." (Laws, 1901, ch. 82.)

At that time the original section referred to provided for a limitation of the time for commencing proceedings to reverse, vacate or modify judgments or final orders. This was the only subject mentioned in the section, and in that respect section 592 of the code, as found in the Revised Statutes of 1866, has remained the same, and by the same number until the present time. The section has contained but one subject during all this time, to wit: The time for commencing proceedings in error. There is but one section 592 of the code, and ever has been. The bill in question contained nothing except that which was germane to the subject matter of section 592. Clearly there was nothing incorporated in the bill but that which had a direct connection with the general object of both the original section and the amendment. The title gave notice that it was intended to amend section 592. This section treated of but one subject. The bill amended it in regard to that particular subject, and no one, however dull of comprehension, could have been misled as to the purpose of the legislation proposed by the amendment.

Again, in *In re White*, 33 Neb. 812, it was held:

"The Compiled Statutes having been published under authority of law, and being supposed to contain all the laws in force at the date of publication, may be amended by a proper reference thereto, and if the amendatory act clearly points out the portion of the statute amended, the objection that the amendment is of the Compiled Statutes will be unavailing."

In that case it was further said:

"The legislature has the right to choose the title of any act passed by it, and although that chosen may not be the

most appropriate, yet unless the act is not within the title, or contains two or more subjects, or otherwise violates the constitution, it would not be declared unconstitutional."

In *McCall v. Bane*, 45 Fed. 828, it was held: An act "entitled 'An act to amend section 3101 * * * of the annotated laws of Oregon,' in which said section is set out as amended, is not in conflict with either section 20 or 22 of article 4 of the constitution of Oregon."

An examination of the constitution of that state discloses that, in addition to the provisions relied on by the defendant herein, it contains the following:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

It will be observed that the constitution of this state does not prohibit amendments by title; and if the amendment in that case under such a constitutional provision was valid, it would seem that the act in question is not vulnerable to the defendant's objection, that it conflicts with the provisions of our constitution. In *County of Cass v. County of Sarpy*, 63 Neb. 813, an act entitled "An act to amend section 88, chapter 78 of the Compiled Statutes of Nebraska of 1897, and to repeal said original section," was held valid. In *Brandon v. State*, 16 Ind. 197, and in *State v. Bowers*, 14 Ind. 195, it was held that if the title to the original act is sufficient to embrace the matters covered by the provisions of an act amendatory thereof it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. This rule also has the approval of Judge Cooley in his valuable work on *Constitutional Limitations* (5th ed.), *146, and note. See also *Miller v. Hurford*, 13 Neb. 13; *Fenton v. Yule*, 27 Neb. 758, and *Gatling v. Lane*, 17 Neb. 80.

It seems, therefore, both on principle and precedent, that the amendatory act in question is valid, and it is therefore upheld.

The filing of a petition in error with a transcript of the judgment complained of, and the issuance of a summons

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in error thereon within six months after the rendition of such judgment, together with the service of such summons, alone gives this court jurisdiction to review the proceedings of the district court in an action at law. It follows that the objection to our jurisdiction must be sustained unless a valid excuse has been shown for a failure to perfect the error proceedings within the time limited by the statute. The only excuse presented by counsel for the defendant company is that he relied on the clerk of the district court to inform him of the time when his transcript must be filed in this court. This does not deserve serious consideration. Counsel who tried the case knew when the judgment was rendered and when his time to perfect his error proceedings would expire, much better than the clerk of the district court, or any one else. It is to be regretted that the defendant company cannot have the proceedings of the trial court reviewed. But we see no way to avoid the consequences of the delay, which unfortunately has occurred in this case. Therefore the objection to our jurisdiction is sustained, and the proceeding in error is hereby

DISMISSED.

EDWARD CASSIDY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13 547.

Review. In an action at law in which no motion for new trial has been filed in the district court, this court will not consider the question of the sufficiency of the evidence to sustain the judgment.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

A. O. Troup and Switzler & St. Clair, contra.

OLDHAM, C.

This was an action on a claim filed in the county court of Douglas county against the estate of Henry L. Collier, deceased. The claim was disallowed by the county court and an appeal was taken by the claimant to the district court, where on a trial *de novo* a judgment was rendered in favor of the executor of the estate and against the claimant, and the claimant brings error to this court.

No motion for a new trial was filed in the court below. This being an action at law, questions concerning errors alleged to have occurred during the progress of the trial will not be considered by this court in the absence of a motion for new trial in the court below. It is not claimed that the pleadings are insufficient to sustain the judgment. The question urged is as to the sufficiency of the testimony to support the judgment, but this question we cannot examine in the absence of a motion for a new trial.

It is therefore recommended that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN H. LEVY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13,548.

Judgment of the district court affirmed for the reason set forth in *Cassidy v. Collier*, ante, p. 376.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

A. C. Troup and Switzler & St. Clair, contra.

OLDHAM, C.

This case stands on all fours with *Cassidy v. Collier*, ante, p. 376, and was submitted on the same briefs, tried at the same time, by the same counsel, in the same court, on identical records. Hence, for the reasons assigned in *Cassidy v. Collier*, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LUCY A. COLBY V. MARY J. FOXWORTHY

FILED SEPTEMBER 22, 1904. No. 13,633.

1. **Petition: SUFFICIENCY.** Amended petition examined, and held to state a good cause of action.
2. **Contract: ALTERATION.** The alteration of a written contract by a stranger, without the privity or consent of the parties interested, will not avoid the contract, where the contents of the same, as it originally stood, can be ascertained.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Flansburg & Williams, for plaintiff in error.

L. C. Burr, contra.

OLDHAM, C.

This is an action to foreclose a real estate mortgage, and is before this court for a second review, this time on a petition in error by plaintiff to set aside a judgment for the defendant entered in the court below. The opinion in this case on the first hearing is found in 64 Neb.

216. This opinion contains a full and complete statement of the issues then involved in the controversy. At the first hearing, plaintiff alleged on her note and mortgage; defendant answered pleading a material alteration of the instrument by the insertion of the word "gold" before dollars in both the note and mortgage, after their execution and delivery to the Lombard Investment Company, without the knowledge, consent or acquiescence of the defendant. To this answer the plaintiff had replied with a general denial, and a plea of estoppel by reason of defendant having paid nine of the interest coupons attached to the note, containing the same alteration, without objection. At the first trial the district court found the issues in favor of the plaintiff, holding that, by the payment of the interest coupons, defendant was estopped from complaining of the alteration in the note. When this judgment was reviewed, we held that the alteration by the insertion of the word "gold" before dollars in the instrument was a material alteration, and that the evidence was not sufficient to show that defendant was estopped from pleading this alteration by payment of the different coupons attached to the note.

When the cause was remanded for a new trial, plaintiff filed an amended petition in the court below in which it was alleged, in substance, that the note was originally given without the word "gold" therein, but that, after the execution and delivery of the note and mortgage, some one to the plaintiff and the Lombard Investment Company unknown, without any authority and without the instructions or the concurrence of the Lombard Investment Company, or the plaintiff, accidentally or inadvertently stamped the word "gold" therein. The prayer of the amended petition was that the contract as evidenced by the mortgage and note, with the word "gold" omitted, be enforced. Defendant filed a motion to strike the amended pleading from the files, for the reason that it was a sham pleading, and in conflict with and contradictory to the confessions made in the reply of the plaintiff

OLDHAM, C.

This case stands on all fours with *Cassidy v. Collier*, ante, p. 376, and was submitted on the same briefs, tried at the same time, by the same counsel, in the same court, on identical records. Hence, for the reasons assigned in *Cassidy v. Collier*, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LUCY A. COLBY V. MARY J. FOXWORTHY

FILED SEPTEMBER 22, 1904. No. 13,633.

1. **Petition: SUFFICIENCY.** Amended petition examined, and held to state a good cause of action.
2. **Contract: ALTERATION.** The alteration of a written contract by a stranger, without the privity or consent of the parties interested, will not avoid the contract, where the contents of the same, as it originally stood, can be ascertained.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Flansburg & Williams, for plaintiff in error.

L. C. Burr, contra.

OLDHAM, C.

This is an action to foreclose a real estate mortgage, and is before this court for a second review, this time on a petition in error by plaintiff to set aside a judgment for the defendant entered in the court below. The opinion in this case on the first hearing is found in 64 Neb.

216. This opinion contains a full and complete statement of the issues then involved in the controversy. At the first hearing, plaintiff alleged on her note and mortgage; defendant answered pleading a material alteration of the instrument by the insertion of the word "gold" before dollars in both the note and mortgage, after their execution and delivery to the Lombard Investment Company, without the knowledge, consent or acquiescence of the defendant. To this answer the plaintiff had replied with a general denial, and a plea of estoppel by reason of defendant having paid nine of the interest coupons attached to the note, containing the same alteration, without objection. At the first trial the district court found the issues in favor of the plaintiff, holding that, by the payment of the interest coupons, defendant was estopped from complaining of the alteration in the note. When this judgment was reviewed, we held that the alteration by the insertion of the word "gold" before dollars in the instrument was a material alteration, and that the evidence was not sufficient to show that defendant was estopped from pleading this alteration by payment of the different coupons attached to the note.

When the cause was remanded for a new trial, plaintiff filed an amended petition in the court below in which it was alleged, in substance, that the note was originally given without the word "gold" therein, but that, after the execution and delivery of the note and mortgage, some one to the plaintiff and the Lombard Investment Company unknown, without any authority and without the instructions or the concurrence of the Lombard Investment Company, or the plaintiff, accidentally or inadvertently stamped the word "gold" therein. The prayer of the amended petition was that the contract as evidenced by the mortgage and note, with the word "gold" omitted, be enforced. Defendant filed a motion to strike the amended pleading from the files, for the reason that it was a sham pleading, and in conflict with and contradictory to the confessions made in the reply of the plaintiff

to the original answer of defendant, and to all the record made in the action upon the former trial in the district and supreme courts, and for the further reason that the amended petition alleged a new and different cause of action from that set forth in the original petition. Defendant also moved for judgment on the pleadings and mandate. The court sustained these motions, struck the amended petition, and entered judgment for defendant upon the mandate and original pleadings on file in the cause. To review this action plaintiff brings error to this court.

Three propositions are involved in this controversy, and but three are determined in our former opinion, and are now governed by the rule of "the law of the case." The first of these is that the alteration of the instrument by inserting the word "gold" before dollars was a material alteration; the second is that the defendant is not estopped from pleading this defense by paying without objection the nine interest coupons attached to the note, which contained this condition; third, that the alteration was made without defendant's knowledge and after the execution of the note and mortgage.

Plaintiff acquiesced in the questions of law and of fact determined by this court at the first hearing of the cause and filed an amended petition, the substance of which has already been set out in this opinion, in which she, however, denied any knowledge of herself or her assignor, the Lombard Investment Company, concerning the alteration and mutilation of the note and mortgage. We do not think the amended petition was a departure in any sense from the original cause of action. The original cause was instituted for the purpose of foreclosing a mortgage, securing a note and one coupon on certain lots situated in the city of Lincoln, Nebraska. The original petition was the ordinary statutory petition for the foreclosure of a note and mortgage. The amended petition aims at the same end, but alleges the existence of facts, probably unknown to plaintiff at the time the original petition was filed, which tend to

show a spoliation of the note and mortgage by an intermeddler, without the knowledge or consent of either plaintiff or her assignor. This allegation did not affect the relief prayed for in the original petition in any manner because the original petition did not ask for a judgment directing the payment of the indebtedness in gold dollars. The amended petition is not necessarily contradictory of any fact alleged either in the former petition or in plaintiff's reply to defendant's answer to such petition. It will be remembered that defendant's answer pleaded a fraudulent alteration of the instrument by plaintiff or her assignor. This was denied by the reply and the denial of a fraudulent alteration of the note and mortgage by either plaintiff or her assignor is in no wise inconsistent with or contradictory to the allegation of the amended petition.

It therefore seems clear that, under the liberal rule of our code permitting amendments in furtherance of justice, the trial court should have permitted the filing of this petition on terms as to payment of costs which he might have deemed fair and equitable, unless the petition wholly failed to state a cause of action. In view of the modern rule that the alteration of a written contract by a stranger without the privity or consent of the parties interested will not avoid the contract where the contents of the same can be ascertained, we think the petition stated a good cause of action. This rule is sustained by the holdings in *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119; *Drum v. Drum*, 133 Mass. 566; *Fuller v. Green*, 64 Wis. 159, and is fully recognized in this state in *Walton Plover Co. v. Campbell*, 35 Neb. 173, and was commented upon with favor by Day, C., in the first opinion rendered in the instant case.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

LETTON, C., concurs. AMES, C., not sitting.

By the Court: For the reasons stated in the foregoing

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opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

CITY OF SOUTH OMAHA V. SARAH MCGAVOCK.

FILED SEPTEMBER 22, 1904. No. 13,162.

Special Assessment: RECOVERY. A person seeking to take advantage of subdivision 63 of section 68, chapter 15, laws of 1889, known as the South Omaha charter of 1889, which allows taxes to be paid before delinquency under protest, and gives the right to recover the same back from the city if illegal, must bring himself within the provisions of the statute by paying the taxes before the whole amount is delinquent before he is entitled to recover.

ERROR to the district court for Douglas county: PAUL JESSEN, JUDGE. *Reversed.*

A. H. Murdock, for plaintiff in error.

F. A. Brogan, *contra*.

LETTON, C.

This action was brought by the defendant in error in the county court of Douglas county to recover the amount of certain special assessments on her property levied thereon by the city of South Omaha, and paid by her under protest. The plaintiff recovered a judgment against the city in the county court and also on appeal in the district court, to reverse which judgment the plaintiff in error has prosecuted this proceeding.

The action was commenced under subdivision 63 of section 68, chapter 15, laws, 1889, known as the "South Omaha charter of 1889." That part of subdivision 63 which is applicable to this case is as follows:

"Any party feeling aggrieved by any such special tax or assessment, or proceeding, may pay the said special taxes assessed and levied upon his, her or its property or such

instalments thereof as may be due at any time before the same shall become delinquent, under protest, and with notice in writing to the city treasurer that he intends to sue to recover the same back, which notice shall particularly state the alleged grievance and the ground thereof; whereupon such party shall have the right to bring a civil action within 60 days thereafter, and not later, to recover back so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the costs to follow the judgments, or to be apportioned by the court as may seem proper, which remedy shall be exclusive." It appears that the special assessment, which the plaintiff paid, was assessed against her property for the purpose of grading the street upon which her property abutted. The first instalment of the tax became delinquent in 1892. The whole tax became delinquent in 1897. The payment was made by defendant in error on October 8, 1900, several years after the last instalment became delinquent. The plaintiff in error insists that the defendant in error did not bring herself within the provisions of the statute quoted, having failed to pay the tax before it became delinquent, and having failed to give notice that she intended to sue to recover the same back, and that consequently the payment of the tax was voluntary, and cannot be recovered back. It is conceded by the defendant in error that unless she has brought herself within the statute, she is not entitled to recover.

The defendant in error contends that a proper construction of the statutory provision is, that a party who wishes to avail himself of its provisions may wait until after the entire tax is due and delinquent, and pay it as a whole, and then bring his action to recover back the amount; or, without waiting for the entire amount to mature, he may pay such instalments as are due, but in that case he must pay them before they become delinquent. In other words he contends that the phrase "before the same shall become delinquent" refers only to the instalments, and not to the entire tax.

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in error thereon within six months after the rendition of such judgment, together with the service of such summons, alone gives this court jurisdiction to review the proceedings of the district court in an action at law. It follows that the objection to our jurisdiction must be sustained unless a valid excuse has been shown for a failure to perfect the error proceedings within the time limited by the statute. The only excuse presented by counsel for the defendant company is that he relied on the clerk of the district court to inform him of the time when his transcript must be filed in this court. This does not deserve serious consideration. Counsel who tried the case knew when the judgment was rendered and when his time to perfect his error proceedings would expire, much better than the clerk of the district court, or any one else. It is to be regretted that the defendant company cannot have the proceedings of the trial court reviewed. But we see no way to avoid the consequences of the delay, which unfortunately has occurred in this case. Therefore the objection to our jurisdiction is sustained, and the proceeding in error is hereby

DISMISSED.

EDWARD CASSIDY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13,547.

Review. In an action at law in which no motion for new trial has been filed in the district court, this court will not consider the question of the sufficiency of the evidence to sustain the judgment.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

A. O. Troup and Switzler & St. Clair, contra.

OLDHAM, C.

This was an action on a claim filed in the county court of Douglas county against the estate of Henry L. Collier, deceased. The claim was disallowed by the county court and an appeal was taken by the claimant to the district court, where on a trial *de novo* a judgment was rendered in favor of the executor of the estate and against the claimant, and the claimant brings error to this court.

No motion for a new trial was filed in the court below. This being an action at law, questions concerning errors alleged to have occurred during the progress of the trial will not be considered by this court in the absence of a motion for new trial in the court below. It is not claimed that the pleadings are insufficient to sustain the judgment. The question urged is as to the sufficiency of the testimony to support the judgment, but this question we cannot examine in the absence of a motion for a new trial.

It is therefore recommended that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN H. LEVY V. CHARLES B. COLLIER, EXECUTOR.

FILED SEPTEMBER 22, 1904. No. 13,548.

Judgment of the district court affirmed for the reason set forth in *Cassidy v. Collier*, ante, p. 376.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

A. C. Troup and Switzler & St. Clair, contra.

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4. ———. The assessment of property is not final until acted upon by the county and state boards of equalization, and not until the action of the latter is certified to the county clerks of the different counties and by them extended upon the tax rolls.
5. ———. An assessment is an official listing of persons and property, with an estimate of the value of the property of each for purposes of taxation.
6. ———: COLLATERAL ATTACK. The state board, in the equalization of assessments as between different counties, acts in a *quasi* judicial capacity, and the action taken is not subject to collateral attack except upon grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law.
7. ———: IMPEACHMENT. The action of the state board in the equalization of assessments as between the different counties in ordering a per centum of increase in the aggregate valuation of some of the counties cannot be impeached in the absence of fraud, bad faith or usurpation of power, by evidence tending to prove that the property in the county affected was assessed by the county authorities at its actual cash value.
8. ———: NOTICE. No notice is required, other than that given by statute, of the time and place of meeting or of action taken by the state board in the equalization of the assessments of property of the different counties so as to conform to law.
9. Constitutional Law. The section of the statute providing for the equalization of the assessments of property as between the different counties by the state board by a per centum of increase or decrease of the aggregate valuations so as to make the same conform to law is not invalid because no provisions are made for an appeal from such action to the courts of the state.
10. ———. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection.
11. Equalization: STATE BOARD. The state board cannot, under the guise of equalization, raise valuations merely for the purpose of making such increase, but when an increase results incidentally in the equalization of property, so that all property may bear its equitable proportion of the burdens of taxation, such resulting increase is within the legitimate exercise of the power to equalize.
12. ———: ———. The state board of equalization cannot deal with

individual assessments, nor take into consideration inequalities as between individual taxpayers, but it deals only with the values of the taxable property of a county as a whole.

13. ———: COUNTY BOARD. Individual discrepancies and inequalities, the law contemplates, shall be corrected and equalized by county boards of equalization, who are specially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may be just. A taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all property in a county so as to conform with all other property throughout the state.
14. ———: CONSTITUTIONAL LAW. The fact that an individual taxpayer of a county has returned for assessment and taxation money on hand and in bank at its full face value will not prevent the state board from equalizing the assessment by raising the aggregate value of all property in such county the per centum found necessary to bring it to a uniform standard with all property of the different counties of the state, nor do provisions of this character violate the fundamental law requiring all persons and corporations to pay a tax in proportion to the value of his, her or its property.
15. ———: ———. Such an assessment of money at its legal value, and an order of increase in the value of all property of the county, including such money, can, at most, affect only the one item of property that is assessed in the first instance at its face value.
16. Equity. Whether a court of equity would grant relief from such overvaluation not determined.
17. Injunction. In no event will an injunction lie until taxes legally due on such assessment are paid or tendered.

HOLCOMB, C. J.

The state board of equalization and assessment, acting under the provisions and by the authority of section 130, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10529), being a part of the general revenue act, increased the aggregate assessment of several of the counties of the state, including that of the county of Nemaha, which was raised 5 per cent. above the amount as

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assessed and equalized by the county authorities. The action thus taken being certified to the county clerk of said county, it became his duty under said section to add to the assessment of each piece or parcel of property assessed in said county an amount equal to the per cent. of increase so directed as aforesaid. The plaintiff in this action brought in the district court for said county an injunction suit for the purpose of restraining the county clerk and his deputy from extending on the tax rolls of said county the percentage of increase to the assessed valuation as certified by the state board of equalization. After joinder of issues and a hearing to the court, the injunction was made perpetual, and the defendants prosecute error proceedings in this court.

The substance of the allegations of the plaintiff's petition on which is grounded his right to the relief prayed for is to the effect that: (a) The state board of equalization, in ordering the increase complained of, acted arbitrarily, capriciously and fraudulently; (b) that all property, both real and personal, in Nemaha county, had been valued at its true, full and actual cash value, and assessed at one-fifth thereof as provided by law, by the local authorities, and that the proposed per centum of increase would operate to raise the value of all property above its actual cash value, discriminate against the taxpayers of Nemaha county and violate the provisions of the fundamental law which require that all property shall be assessed so that each person and corporation shall pay a tax in proportion to the value of his, her or its property; (c) that no notice of any kind was given to the taxpayers of Nemaha county of the proposed increase, and that no way is provided by which the action of the board can be reviewed in a court of last resort; (d) that the action of the state board of equalization was null and void, because the increase of the aggregate valuation of the several counties as ordered was, in effect, a reassessment of property, and not an equalization thereof, and that said board exceeded its powers and jurisdiction; (e) there are also allegations to be found in the

petition to the effect that two certain taxpayers of the county, who are named, listed and returned for assessment certain sums of money on hand and in bank, which were valued and assessed at their full legal value, and that there was returned for assessment and assessed in said county the aggregate sum of \$306,505 in money at its full face value; and that the state board of equalization, knowing such facts, without authority, and in excess of its powers, by said order of increase raised the valuation of such property above its legal and face value, in violation of the provisions of the fundamental law requiring uniformity and equality in the valuation of property taxed for the purpose of raising needful revenues.

The constitutionality of the section under which the state board acted is specially challenged in the petition, but the grounds advanced are substantially the same as those above mentioned as the foundation for maintaining the injunction suit, and will be covered, without particularly referring thereto, in the general discussion to follow.

1. There are found in the petition allegations of a very general character charging that the state board of equalization in ordering the per centum of increase complained of, acted in a capricious, arbitrary and fraudulent manner. The trial court, while its principal finding was general and in favor of the plaintiff in the suit, found specially, "that the state board of equalization and assessment, in directing the increase of five per cent. to the assessed valuation, acted in good faith and without fraud." This finding is amply supported by the evidence, and is the only one that could have been sustained. It is not to be doubted that the state board of equalization, in taking the action and making the order complained of, acted in the utmost good faith, with a view solely of equalizing the assessments of the different counties of the state in the discharge of a duty imposed upon it by law. The board is not under the statute required to enter into a formal judicial investigation of the values of property to be affected by its action

in the discharge of its duties as a board of equalization. It is its duty under the law to adjust and equalize the valuation of real and personal property in the different counties by a per centum of increase or decrease of the aggregate valuation of the county, with the view of apportioning equitably the burden of state government, and, in doing so, each member acts upon his own knowledge of the facts and without requiring other evidence. The fact that valuations are increased or decreased in any one county without the examination of witnesses is immaterial. When the board has before it the abstracts of assessment of the different counties, such as are required to be formulated and furnished for its information under the law, it is in a position to proceed in the discharge of its duties pertaining to the equalization of assessments of the different counties, and is authorized to act upon such information and the knowledge of its members as to values of property generally, without further or different information or greater formality. 1 Cooley, Taxation (3d ed.), 784; 1 Desty, Taxation, 505; *People v. Lothrop*, 3 Colo. 428; *Mayor of City of New York v. Davenport*, 92 N. Y. 604; *St. Louis, V. & T. H. R. Co. v. Surrell*, 88 Ill. 535. The question therefore of fraud, arbitrary or capricious action, or other alleged improper motive or conduct on the part of the different members of the board in entering the order complained of, must be eliminated in the consideration of all further questions arising in the case.

2. Broadly stated, the principal ground relied on to maintain the injunction sued for is the alleged fact that all property in Nemaha county was valued by the county authorities at its full and actual cash value, and that the proposed increase ordered by the state board of equalization will result in an overvaluation of property, operate as a discrimination against the taxpayers of the county, in that it compels them to pay taxes on property they do not possess, in violation of the constitutional rule requiring taxation to be according to the value of the property taxed. The weakness of the position assumed lies in the premises

advanced in support of it. It is not conceded that the property assessed in this county as valued by the county authorities is assessed at its full value; nor can it be accepted as a sound proposition that the values placed on the property listed with and assessed by the county assessor and his deputies are conclusive and binding on the state board of equalization as being the true and actual values thereof. The values of property on which taxes are to be levied are, under the statute, to be determined, not by the county assessor alone, but only in conjunction with equalizing boards which are provided for the very purpose of correcting errors and inequalities in valuations as fixed by the assessor, and to bring all property values to a uniform standard. It is the duty of the county assessor and his deputies to list all property in the county subject to taxation, and value the same in the assessment thereof at its actual cash value. After the property has thus been scheduled and assessed and returned to the county board, it is the duty of the latter, under the provisions of section 121, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10520), to fairly and impartially equalize the valuation of the personal property and the real estate by raising or lowering the valuation as returned by the county assessor, and to hear grievances and complaints regarding the different assessments returned, and to review and correct the same as shall appear to be just; all of which is to be done in the manner provided in said section. By the section under consideration, after the forwarding of abstracts of the assessments of the different counties as is provided in the revenue act, it is made the duty of the state board of equalization, at the time and place therein stated, to meet for the purpose of equalizing assessments as between the different counties, and to examine the abstracts of property assessed for taxation in the several counties and to equalize such assessments so as to make the same conform to law. For that purpose, power is given the state board to increase or decrease the assessed valuation of any county by a per centum

and to certify the same to the county clerk of the county affected, whose duty it is to add to or deduct from each piece or parcel of property an amount equal to the per cent. of increase or decrease as thus fixed by the state board. The assessment and valuation of property, as well as the subject of taxation generally, is purely a matter for the legislature, whose power in the premises is plenary except as limited by the constitution. By the constitution it is expressly said that the value of property on which taxes are levied shall be determined in such manner as the legislature shall direct. The legislature has provided by statute that the county assessor shall ascertain the value in the first instance, and that the valuation as thus determined is subject to correction and review as between individual taxpayers and taxing districts in the county by the county board of equalization and that the values of the property of the different counties in the aggregate as thus determined may be adjusted and equalized by the state board of equalization, to the end that all property of the different counties may contribute its just and equitable proportion of the public revenues. These several steps, then, it will be observed, are necessary to be taken in order that values may be legally and finally ascertained for the purpose of levying taxes as a means of producing revenues. This method of determining values for purposes of taxation is contemplated not only by the statutory law, but also by the constitution, which in terms confides the subject to the legislative branch of government. That these different steps are all essential to the ascertainment of the true value of property, and the making of a valid assessment, is made manifest by the language of section 132, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10531). It is there declared that no assessment shall be deemed final until the action of the state board shall have been had and certified to the county clerks, and by them extended upon the tax rolls, and that the assessment as made and corrected by the county board of equalization and by the state board shall be the final assessment

of property for that year, and taxes for all purposes shall be levied upon such final assessment. An assessment means the determination of the value of a man's property for the purpose of levying a tax; an official listing of persons and property with an estimate of the value of the property of each for purposes of taxation. 3 Cyc. 1111. Wherein, then, may it be said that the state board of equalization has transcended its powers and acted beyond the scope of its authority in regard to the matters complained of? The actions not only of the county assessor in fixing the valuation in the first instance, but also that of the county board of equalization and of the state board of equalization in equalizing as between different counties, are in their nature *quasi* judicial, and are not subject to collateral attack except upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon them by statute. In *State v. Savage*, 65 Neb. 714, it is held:

"In assessing property for taxation purposes the board is clothed with *quasi* judicial powers as to the valuation of such property, and when it has once acted on sufficient information, and expressed an honest judgment as to such value, its judgment cannot be controlled by the writ of mandamus." Also "The presumption is that, when an officer or assessing body values property for assessment purposes, he or it acts fairly and impartially in fixing such valuation."

In 1 Cooley, Taxation (3d ed.), 784, it is said:

"Equalization of assessments has for its general purpose to bring the assessments of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. To accomplish this purpose assessment rolls are equalized by county courts, boards of supervisors or commissioners, and the aggregate of the county assessments by a state board established for the purpose. This is not done by changing individual assessments, but by fixing the aggregate sums for the several districts at what,

in the opinion of the board, they should be, so that general taxes may be levied according to this determination, instead of on the assessor's footings. These boards act judicially in equalizing, and their decision is conclusive. * * * In raising or reducing the assessment of a district, it is sufficient for the board to designate a percentage of increase or reduction."

Under a revenue statute essentially similar to ours in respect of the matter now under consideration, it is said by the appellate court of the state of Indiana:

"County boards of review and the state board of tax commissioners are clothed with *quasi* judicial powers in bringing about uniformity and equality of taxation. The acts of these boards are judicial in their character, and their judgments are not open to collateral attack. If errors or irregularities are committed, they must be corrected in the mode pointed out by the statute; and if not so corrected, they are conclusive; for courts have not the power to control their discretion." *Biggs v. Board of Commissioners*, 7 Ind. App. 142. See also *Jones v. Rushville National Gas Co.*, 135 Ind. 595. Other authorities might be cited without number, but the above are believed sufficient to set at rest the contention that the action of the state board, in regard to the order complained of, can be impeached by an attempt to show that the property in Nemaha county had been by the assessors valued at its full and actual cash value. As well might an issue be raised as to the value placed by the county assessor on the property of each individual taxpayer, and an attempt made to annul the assessment on the ground of overvaluation, which the authorities are all agreed cannot be done. In the absence of fraud, or other misconduct, or arbitrary exercise of power equivalent thereto, the rule is universal to the effect that the discretion of assessing officers and boards of equalization cannot be controlled by the courts in collateral proceedings, nor can errors of judgment and overvaluation in the assessment of property be rightfully reviewed by them in the absence of statutes authorizing

such proceedings. *Loewenthal v. People*, 192 Ill. 222; *New Haren Clock Co. v. Kochersperger*, 175 Ill. 383; *State v. Savage, supra*; 1 High, Injunctions (4th ed.), secs. 490, 493.

3. With reference to the alleged want of notice of the meeting of the state board of equalization, none is required. The section under which the board acted fixes the time and place of the meeting, and this of itself is sufficient notice, even though one were required, to the different counties and all persons interested, of the time and place of such meeting. By this statute all are warned as to when the meeting will occur, and the nature of the action which may be taken in pursuance of the power therein conferred upon the board. The section meets all legal requirements as to public notice, and no additional duty devolves upon the board to notify any of the time and place of its meeting, or of its contemplated action when convened for the purposes contemplated by the statute. *Hallo v. Helmer*, 12 Neb. 87, is a case directly in point. It is there held that where the valuation of property as returned by the assessor as to an entire precinct or tax district is relatively too low or too high, it may be raised or lowered by the board of equalization without notice previously given to the property owners. Citing *Dundy v. Richardson County*, 8 Neb. 508, in support of the rule. Of like effect is 1 Cooley, Taxation (3d ed.), 786; *Spalding v. Hill*, 86 Ky. 656; *State v. Armstrong*, 19 Utah, 117.

Whether or not the action of the state board of equalization in ordering a per centum of increase to the aggregate valuation of the property in the different counties affected by the order may be reviewed by proceedings in error in the courts need not here be determined. In either event, the plaintiff must fail in this action on the merits of the case as disclosed by the pleadings and the evidence. Judgment must go against him regardless of the question. He bases his right to an appeal to the courts, for the purpose of testing the legality of the proceedings of the state board of equalization, on the ground that its action is not review-

able in a direct proceeding, and at the same time complains that his property is being taken without due process of law. These are inconsistent positions. He certainly is not denied due process of law if the courts are open to him in which he may try the question of the scope of action and the power of the state board to equalize the valuation of properties as between the different counties so as to bring about uniformity and equality of taxation. It is not essential, in order to constitute due process of law, that a taxpayer shall have the right to a direct proceeding in the courts to review the action of persons, boards and tribunals empowered to assess property and levy taxes for the purpose of raising revenues for expenses of government. It is not required that judicial proceedings be resorted to in enforcing the levying and payment of taxes. The right to an appeal is purely statutory. 2 Cooley, Taxation (3d ed.), 1393. These are special officers and tribunals within themselves empowered to do and perform all acts necessary and essential in the accomplishment of the collection of the public revenues. Due process of law is observed if, in the different steps taken by the officers and tribunals created by statute, an opportunity is given to an individual taxpayer who may feel aggrieved to be heard with reference thereto, and power is given to redress such grievance as may be right and just. Personal notice is not always essential. Notice given by statute or by publication may be sufficient. An owner is not deprived of his property without due process of law if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in subsequent proceedings for its collection. 1 Cooley, Taxation (3d ed.), 60.

4. Concerning the contention that the state board in respect of the action taken did not equalize but reassessed the property of the several counties, raising the aggregate valuations thereof according to the percentage applied to each county, it may be said that, manifestly, the board has

no power to increase valuations merely for the purpose of making such increase. The limitations of law relative to tax levies, the fixing of valuations and the equalization thereof, cannot be nullified and rendered impotent by an attempt to increase the aggregate of the grand assessment rolls under the guise of equalization. *Poe v. Howell*, 67 Pac. (New Mex.) 62; *State v. State Board of Equalization*, 18 Mont. 473, 46 Pac. 266; 1 Desty, Taxation, 505. But, in the case at bar, we think it clear that the increase resulting from the action of the state board was purely incidental to a proper equalization of the assessment of the different counties as returned to that body. From the action taken, it is fairly inferable that, in 66 of the 90 counties of the state, property was found to be assessed uniformly and at its actual cash value, while, in 24 counties, the valuations placed upon property generally were relatively too low and required, in order that the rule of uniformity might be observed and equality attained, a raise of the aggregate valuation of those increased from two per cent. in one instance to ten per cent. in others. Surely it may not be said that, it having been ascertained that so nearly all of the property of the different counties had been assessed at its true value, in order to properly adjust and equalize, there must be a reduction of a certain percentage in this larger number of counties and a corresponding increase and less than was ordered in the smaller number, so that the grand total of the assessment roll should not be disturbed. While a plan or method of raising the value of some of the counties and lowering others may be generally resorted to in order to bring about equality, yet it would, in the present instance, be in a measure a perversion of the law to reduce below its actual value by far the larger proportion of the property in the state subject to taxation for the purpose of avoiding an actual increase in the total valuation of all property. The statute does not limit the state board in the matter of equalization to the aggregate value as shown by the returns of all the different counties. Its provisions are that the board may increase

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or decrease by per centum to be added to or deducted from the aggregate value of the different counties to make them conform to law. Of course, they have authority to equalize; and to equalize is to adjust differences in values so as to bring all to a common standard, and to the end that all property assessed shall bear its just proportion of the burdens of taxation. Where equalization is the main object and the increase resulting therefrom is incidental, we think the action is undoubtedly a legitimate exercise of the powers conferred upon the board. If the object appears to be to raise the aggregate of the total assessed valuation, such action would, in our judgment, have to be condemned as an unwarranted exercise of the authority to equalize. The subject has received some consideration from the court in *Suydam v. Merrick County*, 19 Neb. 155, under a statute which prohibited the raising or lowering of the total valuation of the assessment roll of the county. It is there said:

"It is the duty of the board to find this medium—that is, the mean between the lower and the higher values—adopt it as the true standard, and raise the one extreme and lower the other to it and thus leave the general result or common aggregate of valuation of the property of the whole county neither raised nor lowered, 'except in such an amount as may be actually necessary and incidental to a proper and just equalization.'" See also *Bardrick v. Dillon*, 7 Okla. 535, where it is held that a county board of equalization may adopt as the basis for equalization the assessment of a township which, in their judgment, most nearly represents the true cash valuation, and add to or deduct from other townships such per cent. as will cause them to conform in valuation to the one adopted as a basis, and this notwithstanding such action may either increase or decrease the aggregate valuation as shown by all the township returns. The rule as thus announced in the opinion cited is probably stated too broadly. The opinion apparently overlooks the fact that the valuation of property assessed for taxation is primarily for assessing

officers, and that boards of equalization except as conferred by statutes are not authorized to change the result, and then only in order to effectuate an adjustment of values so as to bring about uniformity. Our statute, we think, contemplates that the state board of equalization may equalize valuations as between the different counties in the sense the word is usually and ordinarily understood. That is, the state board is empowered to correct and adjust inequalities in valuation to the end that all property shall relatively be valued on the same basis for purposes of taxation, as near as the same is practicable. In either view of the subject, however, the action taken by the state board was within the scope of its powers, and the increase in the aggregate valuation of the equalized assessments resulted only incidentally to the main object sought to be accomplished.

5. We are asked to declare the order of the state board of equalization as of no validity and as being in conflict with the constitution respecting the raising of needful revenues by levying taxes on all property according to its valuation, on the ground that, as alleged in the petition, there was returned by certain of the taxpayers of Nemaha county certain sums of money which it is asserted were valued and assessed at the full, fixed and legal value thereof, and that the order complained of results in the assessment of this class of taxable property at a greater valuation than it actually possesses. To this it may be said that the plaintiff is not in a position to raise the question. The increase complained of on this item of property could, at most, affect only the taxpayers listing and returning such property for assessment, and the plaintiff is not one of them. While he professes to bring the action in behalf of himself and all others similarly situated, there are none situated as he is with respect to the assessment of this particular kind of property. He has not stated a cause of action in favor of himself, nor shown himself entitled to the relief he seeks, because of his allegations to the effect that some third parties whose situation is entirely dis-

similar have grounds of complaint which may possibly entitle them to some equitable relief in an independent action. If money on hand or in bank, such as has been returned for assessment purposes, because of its character and characteristics as having a fixed legal value is assessed for a greater sum than is permitted by law, then obtaining relief and redress for the grievance is a matter only for those who have thus been injured. Again, it is manifest that the state board of equalization is powerless to deal with particular items of property returned for taxation and included in the abstracts of assessment on which the board acts. The law provides that the board may equalize only by increasing or decreasing by a per centum of the aggregate valuation of all the property in the county affected by the order. Absolute equality is unattainable, and the law contemplates only that it shall be approached as nearly as may be found practicable. If it were shown that some other class of property was assessed by the county authorities at its full cash value, or for a greater amount, this would be no valid objection to equalizing the property of the county as a whole. The state board does not deal with individual assessments but with the property of a county as a whole, and if it appears to them to be assessed at a valuation relatively lower or higher than the property in all other counties, the whole is affected by the order of equalization, and not the different items or classes. Individual discrepancies and inequalities the law contemplates shall be corrected and equalized by the county authorities, and a taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all the property in the county so as to conform with all other property throughout the state. The county board is especially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may seem just and equitable. The state board possesses no such power. The taxpayer returning money at its legal value

could, if he felt aggrieved, complain that his property was assessed too high as compared with all other property. He has the right to insist that all property be valued on the same basis, and just ground of complaint if such was not done. *State v. Osborn*, 60 Neb. 415. Not having done so, he is presumed to have been satisfied, and the state board was warranted in assuming that all property of the county, of whatsoever kind, had been assessed on the same basis of valuation, and to equalize accordingly. They could presume, and probably did, that all of the money required to be listed had not in fact been returned, or that it was assessed at the same relative valuation as all other property. That tribunal was not bound to, and did not, take into consideration inequalities as between individual taxpayers, and could not under the law do so had it been so inclined. *Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416; *Wells, Fargo & Co. v. State Board of Equalization*, 56 Cal. 194; *State v. Thomas*, 16 Utah 86, 50 Pac. 615. We are not to be understood as holding that property, such as money, which has a fixed, definite and unvarying value, and regarding which there can exist no difference of opinion, may be assessed and the owner required to pay a tax on a value greater than it actually possesses. If such results follow from the acts of the state board which are complained of, we are clearly of the opinion that the proper remedy is not an attempt to nullify the action taken by the state board, nor will an injunction lie restraining the county officers from extending the per cent. of increase as certified by the board, nor will such an over-assessment of this one item of property affect the legality of the order of equalization, which directs that all property in the county be increased the amount of the percentage found necessary to make it conform to all other property throughout the state. Whether a taxpayer thus situated may find relief in a court of equity we need not here determine. But, if such can be done, it is obvious upon the soundest of equitable principles that an action would not lie until there had been paid or tendered the amount of tax

justly and legally due upon the face value of such property. Concerning a case of this character, we now have nothing to do, nor do we express any opinion thereon. A consideration of all questions presented by the record leads us to the conclusion that the state board of equalization acted within the scope of the powers conferred upon it by statute; that its order directing the increase which it made as affecting the county of Nemaha and the property of its taxpayers was valid, and that no provisions of the organic law are violated by its enforcement. It follows that it was and is the duty of the county clerk to extend the same upon the tax rolls of said county. The judgment of the trial court making the injunction perpetual is reversed, and the injunction suit is dismissed.

REVERSED.

STATE OF NEBRASKA, EX REL. GEORGE T. MORTON ET AL., V.
PETER M. BACK ET AL.

FILED OCTOBER 5, 1904. No. 13,605.

1. **Railroads: MUNICIPAL ASSESSMENTS.** In the assessment of railway property for municipal purposes situated in cities of the metropolitan class, such as is required to be listed with and assessed by the state board of equalization for general revenue purposes under the provisions of sections 39 and 40, chapter 77, article 1, Compiled Statutes, 1901, as existing prior to the revenue act of 1903, it is made the duty of the tax commissioner or assessor of such city to accept the values of the fractional part of such railroad property situated in the municipality as the same is valued and assessed by the state board of equalization, and apportioned to such city in accordance with the provisions of said act.
2. ———: ———. The proportional share of railway property as valued and assessed by the state board of equalization belonging to and situated in such city and subject to taxation for municipal purposes may be equalized by the proper authorities of such city, by lowering or raising the value of the same, as thus ascertained, so as to bring about uniformity of valuation in respect of all property subject to taxation within the municipality.
3. ———: **TAXATION.** It is competent for the legislature to provide

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for the valuation and assessment of the property of railway companies, such as is required to be listed and scheduled with the auditor of public accounts by sections 39 and 40, chapter 77, article I, Compiled Statutes, 1901, as heretofore existing, by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation in this state as a unit or as an entirety, and to distribute the value as thus found over the main line or track of such railway company and to the different taxing districts, municipalities, etc., on a mileage basis.

4. **Constitutional Law.** Such a scheme or plan of assessment and taxation of the property of railway companies as therein provided for state, county and municipal purposes does not violate the provisions of the fundamental law commanding uniformity in the valuation and assessment of property for the purpose of raising needful revenues by the levying of a tax upon all property subject thereto according to its value.
5. ———. The valuation and assessment of the property of a railway company, as therein provided, as an entirety, and the distribution of the value thus ascertained upon a mileage basis over the entire line of such railway does not operate as a changing of the situs of the property assessed. Its effect is only to distribute the value of an organic whole to the fractional parts situated in the different subordinate taxing districts through which the line extends and in which the property is actually situated, which is a legitimate exercise of legislative power.
6. **Railroads: TAXATION.** In the assessment of railway property for taxation, as therein provided, it is competent for the legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety, and the distribution of the total value to each taxing district according to the number of miles of main track located therein.
7. **Constitutional Law.** Said sections 39 and 40, as existing prior to their repeal by the revenue act of 1903, are not invalid as taking property by taxation without due process of law. *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, followed.

ORIGINAL application for a writ of mandamus to compel the city council of Omaha to meet as a board of equalization. *Writ denied.*

T. J. Mahoney, for relators.

C. C. Wright, contra.

HOLCOMB, C. J.

This action is begun in this court in the exercise of its original jurisdiction. The relators pray for a peremptory writ of mandamus to compel the respondents, the city council of Omaha, acting as a board of equalization, to reassemble and hear their complaint relative to the alleged low assessment of certain railroad properties situated within the corporate limits, and to equalize the assessment of such properties by raising the assessed value thereof to conform to the standard of value pertaining to all other property assessed for municipal purposes. The substance of the complaint is that the properties of the railroad companies mentioned in the alternative writ, situated within the city limits, are assessed at but a fraction of their true value, while all other property subject to municipal taxation is assessed at its commercial value. The return of the respondents to the alternative writ discloses that, in the assessment for municipal taxation of the railroad properties complained of, the assessing officer of the city accepted the valuations placed thereon by the state board of equalization and the distributive share thereof apportioned to the city of Omaha as the assessable value of such properties, and that, in the equalization thereof, the respondents, acting as a board of equalization, raised the assessments five times the value as fixed by the state board of equalization and returned by the city tax commissioner, which act of equalization, in the judgment of the board, brought the value of the railroad properties thus assessed to a uniform standard of value with other property assessed for municipal purposes and exhausted their powers in the premises. Reduced to its narrowest limits, the question presented for consideration by the pleadings and in briefs of counsel is in respect of the method of procedure by the tax commissioner and the city council in the assessment of railroad properties situated in part in such municipality and subject to municipal taxes, and also, whether the statute providing for the

assessment of railroad property as a unit and distributing the aggregate value to the different counties, townships, cities and towns through which the lines run, on a mileage basis, is in harmony with the fundamental law. The validity of such legislation is especially called in question when applied to the taxation of railroad property in the city of Omaha for municipal purposes.

The legal questions presented, says counsel for relator, are: First, have the respondents correctly interpreted the statutes? Second, are the statutes in question valid?

The answer to the first question must, we think, be in the affirmative. The old revenue act under which the assessment in question was made provided for the assessment of railroad property of the character under consideration by one assessing body, viz., the state board of equalization, for all purposes of taxation—state, county township, school district and municipal. This assessing body, the statute declares, shall value and assess the property of railroad corporations at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the *sum of the whole valuation* by the number of miles of such road or line. It is further provided that, after the valuation and assessment is made as aforesaid, the state auditor shall certify to the county clerks of the several counties in which the properties of such corporations are situated, or any part thereof, the assessment per mile so made on the property of such corporations, specifying the number of miles and the amount in each of said counties. Section 40, article I, chapter 77, Compiled Statutes, 1901. By section 98, chapter 12a, Compiled Statutes, 1903 (Annotated Statutes, 7547), the same being the charter act of cities of the metropolitan class to which the city of Omaha belongs, it is provided: "The tax commissioner shall take the valuation and assessment of railroad property within the city limits from the returns made by the state board of equalization to the county clerk." Assuming, as we do for present purposes, that the legislature may rightfully provide for

the assessment of the property of a railway company by one assessing body, and as one property or as a unit, and apportion the value thereof on a mileage basis, then, as we view the subject, it is not only manifest that the legislature intended but that it is quite appropriate that the distributive share belonging to any one taxing district should be taken and accepted as the assessable value of that part of the whole property which is situated in such district and which shall be subject to taxes as all other property therein. There appears to be no fundamental objection to such an assessment. The assessment thus made and returned would, doubtless, be subject to the authority and power of a board of equalization to raise or lower the value so as to comply with the rule of uniformity and conform to values generally obtaining in such taxing district. In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value. Different precincts have different assessing officers, and these different officers, we know by common experience, widely differ in their valuation of property of approximately the same value. This difference of opinion and judgment necessitates the establishment of a tribunal having authority and jurisdiction to equalize values and bring all property to a common standard of valuation, to the end that each item and class may bear its just and equitable share of the burdens of taxation. A question somewhat akin to the one under consideration was raised in *State v. Aitkin*, 62 Neb. 428, and the propriety of assessments of railroad properties by the state board of equalization, and the acceptance of the valuation thus ascertained for purposes of municipal taxation, was recognized and sanctioned. In upholding a law providing for such method of assessing railroad property situated in a municipality

for municipal purposes, the court, among other things, in the opinion, say:

"The legislature in its wisdom has decided that the value of railroad property can be more accurately and justly estimated by the state board of equalization than by local assessors, and has exercised its constitutional prerogative by providing that railroad property shall be assessed in that manner. Whether or not it is reasonable to suppose that the state board of equalization would have more knowledge and a better opportunity to make a just valuation of such property than local assessors is quite unnecessary to be determined in deciding upon respondent's right to act as tax commissioner. Why may not several valuers constitutionally act upon different kinds of property, or upon the same property, for the purpose of different taxes? The real objection to this act on the ground of uniformity is, evidently, the idea that value is not such a fixed quantity that it is possible for two independent appraisers to agree. If values are fixed for purposes of municipal taxation by one body of assessors, and for county and state by another, it is practically certain that the two will disagree. Enough is said above to indicate an opinion that the only uniformity required as to any tax is that it should be uniform throughout the jurisdiction, that is, that state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city." The result produced by this method of assessment is only that there are different assessing authorities for different kinds of property, each exercising an independent judgment in arriving at the value of the property assessed, and making due return thereof to the proper authorities. The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equalization. If it be proper to assess railroad property as a unit and distribute the total value thereof on a mileage basis, it is obvious that the distributive share going to any one taxing

district may be required to be taken as the assessable value and as the basis of valuation for equalization and taxing purposes. The value of such distributive share of the whole property may, it would seem, be raised or lowered by an equalizing board in order that it may be brought to a common standard and conform to the values placed on all other property. This, as we understand the record, is what was done by the respondents in the case at bar, and if so is, we think, in harmony with legislative intentment. It is the business of such boards, say this court in *State v. Fleming*, 70 Neb. 523, "To fairly and impartially equalize the valuation of all personal property assessed in their respective jurisdictions and raise or lower the same as the justice and equity of the case may require. Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made, so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid, according to the real value of his property. * * * In this way, equality is attained and every interest protected." It is manifest that the legislative plan for the assessment of railroad property situated in a municipality, for municipal purposes, has been followed by the city authorities in the case at bar, and that the interpretation given to these several provisions of the statute by the respondents as to their authority and power is in harmony with the expressed will of the legislature.

The very able and helpful arguments and briefs of counsel on both sides of the controversy are devoted almost exclusively to the second question presented, that is, the alleged invalidity of the statutes providing for the assessment of the property of a railroad company as a unit, and the distribution of the value of the whole on a mileage basis by one assessing body for all purposes of taxation, and it is to this phase of the case that we have given the

fullest consideration and most thorough research at our command. It is the contention of counsel for relators that the provisions of the fundamental law governing taxation are violated in the assessment of railroad property for municipal purposes by the plan adopted and prescribed by the legislature. It is argued that railroad properties of great value located within the corporate limits of the city of Omaha pay taxes on but an insignificant part of the true value; that these properties escape a large share of municipal taxes for which they should be justly burdened and made to contribute to the revenues of the city in return for the protection received in the administration of the affairs of the municipality in which they are situated. Counsel says that here are located costly depots and terminal facilities, including real estate of vast value occupied for such purposes, which ought to respond to municipal taxation according to such values to be ascertained with reference to the actual location of such properties as if separate and independent properties, and without regard to their relation to and connection with the entire lines of railway of which they form a part. The right and power of the legislature to provide a scheme of taxation for municipal purposes by an assessment of railway property as an entirety, and the distribution of the aggregate value on a mileage basis, is boldly challenged, and we are asked to so construe the constitutional provisions relating to the subject as inhibiting such a plan and method of taxation of such properties for municipal purposes. Our complaint, says counsel, is not that the legislature has provided a different method for assessing railroad property from that provided for assessing other property, but rather that, under the statutes relied upon by respondents, a result is obtained which violates the constitutional requirement of uniformity. If, it is said, the legislature had provided for assessing the property of railroads extending into more than one county by determining the value of the railroad as a whole, and then apportioning such value to the several tax districts in pro-

portion to the real values in the several districts, rather than in proportion to the number of miles of main line, such a method would at least be theoretically correct; but that, when the apportionment of the total value is according to the number of miles of main line in any one taxing district, there is an ignoring of the question of value altogether. The mandate of the constitution, it is insisted, is imperative that in every taxing district every owner shall pay a tax in proportion to the value of the property in the district and not the extent of it. The constitutional provisions principally relied on by relators in support of their contention are found in section 1, article IX of the constitution, which declares that revenues are to be raised by levying a tax by valuation so that every taxpayer shall pay in the proportion to the value of his, her or its property subject to taxation, the value to be ascertained in such manner as the legislature shall direct. The necessity for uniformity and equality in taxation is emphatically expressed in *State v. Osborn*, 60 Neb. 415, wherein it is said:

“And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purpose of raising revenue. The constitution forbids any discrimination whatever among taxpayers, thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. The rule of uniformity is satisfied if observed by each jurisdiction imposing the tax.” To the same effect is *High School District v. Lancaster County*, 60 Neb. 147. See also *State v. Poynter*, 59 Neb. 417, and *State v. Karr*, 64 Neb. 514.

By section 6, of article IX of the constitution, it is provided that for corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to person and property within the jurisdiction of the body imposing the same. The requirements of uniformity in

the assessment of property for municipal purposes generally is doubtless the same, and as obligatory under the provisions of section 6, article IX, as that required by the provisions of section 1 of the same article, and it is so held in *State v. Savage*, 65 Neb. 714. The construction given to the first section in the several decisions of this court which we have cited apply with equal pertinency and force to those of section 6. Uniformity with respect to person and property requires that the tax rate must be the same as to all persons affected, and the valuation of the property must be upon the same basis throughout the entire taxing jurisdiction. A departure either as to rate of levy or as to the standard of valuation of the different properties subject to taxation would violate the rule of uniformity demanded by the constitution, and render ineffectual legislation authorizing such a method of procedure in the levying and collection of municipal taxes. It is equally clear that, if property within a municipality having a fixed legal situs therein, was by a scheme or plan of assessment to escape in whole or part municipal taxes upon a valuation in substantial conformity with all other property within the taxing district, this would be a violation of the provisions of said section 6. May the legislature, without infringing on these provisions of the fundamental law, provide for the assessment of the property of railway companies such as is required to be included in the schedules to be returned to the state assessing board upon the unit plan or system, and distribute the value of the whole property along the line of the road thus assessed, and to the different tax districts on a mileage basis? It is earnestly contended by the relators that the several railroad companies having lines in the city of Omaha have valuable terminal facilities, depots and other properties on their right of way and side tracks which have a fixed and actual physical situs, and as such are subject to local taxation upon such values, and that by the distribution of the total value of any one road over the entire line on a mileage basis is to withdraw from

taxation for municipal purposes property situated within the municipality, thereby resulting in a violation of the provisions of the constitution that all property shall bear its just share of tax burdens of the taxing jurisdiction in which it is situated. In a sense, it is no doubt true, that the properties of the large railway corporations doing business in this state, with extensive terminal facilities, switching yards, depot grounds and costly structures in the large cities and towns, are much more valuable mile for mile than a corresponding length of the roadbed and right of way situated outside of such municipalities, consisting usually of but a single track and roadbed and the right of way of from 100 to 200 feet in width. In a legal sense, however, must it be said that the property thus situated is so localized that its situs for the purpose of taxation must be the same as where physically situated, and that any attempt to throw it with the whole mass of property with which it is connected, and of which it forms a part, and assess it as an entirety, and distribute the value on a mileage basis, contravenes the fundamental law?

We may assume that all the lines of railway in this state have been by the state board of equalization assessed at a valuation uniform with the values placed on all other property assessed for revenue purposes, and that the total value of each of such lines of railway has been distributed to the different counties, townships, school and road districts, cities and towns through which such lines extend according to the length of the line in each division for whose benefit taxes are levied. If those portions of the road lying in the city of Omaha are to be valued at a larger sum per mile than other portions of the same line, then it follows that there must be a corresponding reduction of the amount apportioned to the remainder of the line or else an overvaluation and double taxation would be the result, and this would violate the rule of uniformity the same as does undervaluation. The legislative plan contemplates a full valuation of all property of a railway line subject to taxation in this state, and the distribution

of that value equally over each mile of the line, and with equal benefit to every taxing district through which it extends. The relators contend for a method of taxation that recognizes differences of value of different parts of the same line, a localization of such property for taxation and an apportionment of values accordingly, as necessary to meet the demands of the constitutional requirement of uniformity. It is not for us to say that the method adopted by the legislature is the most approved and comes nearest reaching an ideal state in the levying and collection of the public revenues. Yet, it is quite true that this plan has been warmly commended by courts of last resort of many of the states and of the United States as best calculated to more nearly approach perfect uniformity than any other plan that has heretofore been devised. It may be, and possibly is, true that legislative provisions might be enacted in the interest of more just and equitable taxation that would allow some latitude on the part of an assessing body clothed with the power to value and assess railway property to vary the value of different parts of a railway line in the distribution of the value of the whole to conform to the improvements made and character of the property assessed in the different localities through which the right of way and roadbed extends. It is, however, for us to determine only, as best we may, whether the plan of valuing and assessing railway property as adopted by the legislature is in conflict with fundamental law. The courts have generally recognized that upon legal principles, and as a practical question, the properties of a railroad company, because of their peculiar character, can best be assessed by one assessing body, and cannot with any degree of satisfaction be left with local assessing officers. The wisdom and necessity for a taxing body having authority and jurisdiction over the territory covered by all the property of a railroad company, and with power to assess the whole of such property and to fix values which would be uniform over the different lines of railroads to be assessed, seem so apparent that argument can scarcely

add anything. At least the wisdom and experience of those having to do with the subject of taxation have in very many of the states of the Union brought about plans for the assessment of properties of this character by one assessing body, and this method is now quite generally resorted to as the best solution of a difficult problem of railroad taxation. As to those properties which have no fixed situs, such as the rolling stock, franchises and other intangible property, it is difficult to conceive of any more just or equitable scheme or plan than to find the value of the whole and distribute the same throughout the different taxing jurisdictions according to the distance of the line of road situated in each district for whose benefit taxes are levied. In a measure, this same principle, it is manifest, obtains in respect of the line of a railroad, including all properties necessary and used in its operation in the accomplishment of the objects of its incorporation. Carried to its logical conclusion, the contention of the relators would require the assessment of every fractional part of a railroad within any taxing district as separate and independent property, the aggregate of these several values representing the value of the entire property within the state. No two miles of a railway system, if regard be had solely to the real estate composing the roadbed and right of way, the cost of construction, and the value of the superstructures and buildings thereon necessary for the operation of the road, would be exactly the same. Each taxing district would have located therein property of a value peculiar to itself and to no other, and, if the rule of uniformity be observed, an assessment must be made of such property according to its value as thus localized. Must all railway property be thus localized for purposes of taxation? The assessment of the property, which is the subject of the present controversy and the validity of which is challenged, was made by the state board of equalization under the old revenue act. Compiled Statutes, 1901, chapter 77, article I. The provisions assailed are found in sections 39 and 40 of the act. The provisions of

the new revenue act, sections 85-87, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10484-10486), in regard to the questions herein being considered are believed to be in all material respects the same as the provisions of the old law. By section 39, article I, chapter 77, it is made the duty of certain officers of every railroad company doing business in this state and having property therein subject to taxation to file schedules under oath of the property of such company with the state auditor, at a time as therein stated. The schedule is required to disclose the number of miles of such railroad in each organized county, and the total number of miles in the state, including the roadbed, right of way, superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad lines. "Provided, however," says the statute, "That all machine and repair shops, general office buildings, store houses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property." By the succeeding section, authority is given to the state board of equalization to value and assess all property required to be listed and returned to the auditor of public accounts at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is also made the duty of the auditor to certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated the assessment per mile so made on the property of such corporation, specifying the number of miles

and amount in each of such counties. The value of the whole, when ascertained, is by this method apportioned to the several counties, townships, cities and villages and other subdivisions through which such railway line extends, according to the number of miles of railroad situated in such subdivision. It is further declared that all such property shall for the purpose of taxation be deemed "personal property" and placed on the tax lists as thereafter provided. It will be observed that in the assessment of railroad property under this statute no property located off the right of way is assessed by the state board, and that there are certain exceptions as to property specified which is situated on the right of way. It is only the lines of railways, including superstructures, appurtenances and property on the right of way necessary to the successful operation of the road, and the rolling stock and franchises that are required to be assessed by the state board as a unit. In *Adams County v. Kansas City & O. R. Co.*, 71 Neb. 549, this court had occasion to construe the language of the proviso found in section 39, and it is there held that the phrase, "outside of said right of way," etc., qualifies only the word property immediately preceding it and not the specific terms used in the enumeration of other property therein. Accepting this as a correct construction, as we do, and keeping in view the entire act relating to the subject, it becomes obvious that the legislative intendment was to enlarge the situs of the property of a railway company necessary for and used in the construction of its lines and the prosecution of its business so as to cover the entire line of its roadbed and right of way. All of this property is so intimately related to each of the different parts, and so connected together, that it is, it seems, appropriate and legal to so treat and regard it when fixing its value for assessment purposes and apportioning the value to the different tax districts through which the road extends. A clear understanding of the character of the property of a railway company, which the statute requires to be valued and assessed as

a unit, and the value distributed on a mileage basis, is necessary to an intelligent understanding and application to the principles underlying the taxation of this species of property, and of the decisions of the courts of other states relating to the subject. The supreme court of Tennessee in the cases of *City of Chattanooga v. Nashville, C. & St. L. R. Co.*, 7 Lea (Tenn.), 561, and *Franklin County v. Nashville, C. & St. L. R. Co.*, 12 Lea (Tenn.), 521, by its opinions therein comes nearest supporting the contention of counsel for relators, and yet these cases are, we think, clearly distinguishable and are not authority of a decisive character in the determination of the questions as presented in the case at bar. In the first case cited, all the property of whatever description and wherever situated was for the purpose of taxation, under the statute being considered, to be thrown together as a unit or as one property valued as a whole and the value distributed on a mileage basis. In the latter decision of that court, judicial sanction is given to the validity of an assessing statute very similar to the one under consideration except that it was held that depots have a local situs and should be assessed accordingly. But the reasoning by which this conclusion is reached, as counsel well says, is somewhat bewildering. In a discussion of the character of railroad property required to be assessed by the state board of equalization and the reasons for legislation providing for the assessment of such property as a unit, the total value thereof to be distributed on a mileage basis, this court has expressed itself in *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, as follows:

"The common sense view of the subject would seem to be that such purpose was to enable the proper authorities to distribute the avails of such taxation equitably among all the municipal subdivisions through which a road may pass, in the ratio which the number of miles within each subdivision bears to the total number of miles of road within the state, treating each mile as equal in value to every other mile, and regardless of whence came the power under

which any particular portion of the road is constructed. A railroad might have vast terminals at one point, worth as much as the remainder of the line, though it extended through a dozen counties. The subdivision in which these terminals are located is not, under this law, permitted to reap an advantage over other localities, by reason of the mere accident of location; but must share its advantages with these others pro rata. That evidently is the reason behind and under this legislation. How a franchise has been acquired, or whether a particular portion of a line is more expensive to construct than others, is unimportant in determining whether the property should be taxed locally or otherwise. As a matter of fact, this inequality of value was the principal motive for the legislation, which sought to obviate the evils attendant upon such a state of facts. Without such inequality, no legislation would have been necessary, the general laws being in that event adequate for the purpose."

While the constitutionality of the statute was not directly involved, the discussion of the subject is valuable as showing the reasons for treating and assessing railroad property as a unit, and the difficulty of separating it into fractional parts, each piece for the purpose of assessment to be localized and treated as a specific item of property having a value independent of the other portions of the whole. In 1 Cooley, *Taxation* (3d ed.), p. 693, it is observed by the eminent author:

"The property of railroad and canal companies constitutes a legitimate class of property for the purposes of taxation—a class which, in order to treat it fairly in the matter of taxation, must be treated separately.' Indeed the difficulties of assessing, in the same way that property in general is assessed, lines of railroad extending through many municipalities are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed and valued as an entirety, and the value is then apportioned for taxation

among the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property, and it is perhaps more just than any other."

The supreme court of Colorado in the case of *Ames v. People*, 26 Colo. 83, 56 Pac. 656, in passing upon a controversy identical in principle with one in the case at bar, uphold the validity of statutory enactments providing for one body to value and assess all the property of a railway company as a unit and to distribute the value upon a mileage basis. The constitutional provisions as to uniformity in that state, while not the same, are substantially so in principle, and the necessity for equality of taxation is recognized in the decision rendered. In the opinion, it is said:

"In the method of laying a tax, either as to the assessment or the apportionment, the general assembly is not restricted by the constitution, and unless the legislation is palpably unjust, oppressive or inadequate, courts will not substitute their judgment for that of the legislature. Many tribunals of final resort, including the supreme court of the United States and our own court, as will be seen from the cases already cited, have held that the method of ascertaining and distributing values of railroad property like that prescribed in the statute under consideration, if not the only rational one, is, at least, the best and fairest thus far invented." And further on in the same opinion, the court treat the subject in the following manner: "It follows that, in order to secure a just valuation for taxation of this class of property, all of it that is used for the convenient and proper operation of the railway may be assessed as a unit, and the valuation thus ascertained may be apportioned to the various taxing districts upon a mileage basis. Indeed, construing, as we should, sections 3 and 10 together such of the property of a railroad company, real and personal, as is used for the convenient and proper operation of its railway can properly only be assessed and

apportioned for taxation as a unit; and the apportionment upon a mileage basis, as this act prescribes, will come as near to doing exact justice as it is possible to do. * * * This method of apportionment, in our judgment, gives to each local taxing district its just proportion of tax, that is to say, each taxing district gets for purposes of taxation the just valuation of the property physically situate within its territorial limits; for the value of property situate therein cannot be made to depend upon its so-called natural situs, entirely disassociated from the use made of it, but that value, in great measure, depends upon its connection with every other part of the corporation property so used, and situate in every other taxing district in which any part of its railroad lines, considered always in connection with the character of the use made of it. Thus the command of the constitution is obeyed, and, in fact, to each taxing district is given a fair valuation of the railroad property within its territorial limits, and that is all the section requires."

Say the supreme court of Michigan: "The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted." *Detroit Citizens Street R. Co. v. Common Council*, 125 Mich. 673.

In *People v. State Board of Equalization*, 205 Ill. 296, it is said: "The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock or freight in a

country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged, and the land upon which its side or second track and turnouts, and its station, machine shops, round-houses, etc., stand, is as necessary to the successful operation of the road and as much a part of its right of way as the land upon which its main track is laid, and the value of each piece of its right of way must be determined by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way."

Many other authorities could be cited, but the foregoing give a very accurate idea of the trend of judicial opinions regarding the propriety and legality of this method of assessing the property of railway companies. The principle justifying the assessment of railroad properties as a unit, and distributing the value on a mileage basis to the different tax districts through which the railway line or track extends, seems to be that in fact and in legal contemplation for the purpose of assessment, use and sale such property may rightfully be regarded as a physical whole or one entire property extending over the whole line of the railway, the value of which depends not on any separate or fractional part, but upon the whole of the property as an entirety.

The fundamental idea underlying the relators' contention as to the proper method of local taxation of these properties is that the fractional parts of the different railway companies located in the city of Omaha, consisting of the depot grounds, main track and side tracks, and the structures thereon, have a fixed and natural situs, and that they are of themselves of especial value greatly in excess of other portions of equal length of the lines of which they are parts, and that such values are separable from the remainder, and, therefore, to meet the requirements of the

constitution as to uniformity and to the end that all property shall bear its just proportion of the burdens of taxation in the district where it is situated, these properties should be localized in the taxing district in which they are physically situated, and assessed upon their separate values for municipal purposes. Of course, if we assume that such properties have a legal situs and an ascertainable value of themselves within the limits of the municipality, separate and apart from the remainder of the line, and are possessed of a greatly enhanced value over other portions of the main track of equal extent, the contention of relators is conceded and there is left no room for discussion or argument.

The principle underlying the legislation complained of undoubtedly is that every portion of the property of a railway company going to make up the whole is interdependent, and that the situs must be determined with respect to the entire property and not any fractional portion of it. The legislature has fixed, or undertaken to fix, the legal situs of a railroad where the organic structure is, in all the counties and subordinate districts through which the road is constructed, and has provided for the apportionment of a share of the total value to each taxing district in proportion to the length of the main track in such district, upon which taxes are to be levied for all purposes. It is the fractional proportion of the whole distributed to any one taxing district that represents the taxable property of such railroad line in such district, rather than the physical property found therein. This method does not effectuate a moving about of property having a fixed place of location—a change of situs—but amounts only to the valuing of the whole as a unit, and the distribution of the total value along the line and throughout the extent of the physical property, on what is regarded as a fair, just and equitable basis. The nature and characteristics of the property are such as to render it incapable of division into fragmentary parts and the valuing of each of such parts for assessment purposes as though it were a separate and

distinct item of property having a location in a particular taxing jurisdiction. These properties have no market value when considered in fractional parts. Railroad properties are bought and sold as an entirety. The real estate on which the right of way is located cannot be valued in a commercial sense as so many acres, or as lots and blocks, since its value in such cases is determined, in a large measure, by reason of the use to which it is put and the improvements thereon, and then only in connection with the other property of which it forms a part. The legislature has declared that the property of railroad companies required to be valued and assessed by the state board of equalization should, for the purposes of levying and collecting taxes, be regarded as personal property. If this legislative declaration is to be given force, then the right to enact and the validity of the enactment providing for a distributive valuation on a mileage basis would necessarily follow. There will, we apprehend, be no serious contention against the power of the legislature to, by rule of law, fix the situs of all such property (if it may be regarded as personalty) for purposes of taxation. In *Missouri, K. & T. R. Co. v. Board of Commissioners*, 9 Kan. App. 545, 59 Pac. 383, the Kansas court of appeals say:

"Under section 6873, General Statutes of 1889, * * * all property used or held by a railway company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property. The statute declaring such property personal property for the purposes of assessing a tax against it, it follows that such tax must be collected as a tax upon personal property. * * * The legislature had the power to enact the statute declaring the right of way, roadbed and other property held or used in the operation of the railroad to be personal property for the purposes of taxation."

In *Ames v. People*, 26 Colo. 83, the court say:

"The whole argument, however, is based upon the proposition that the property is assessed not where it is physi-

cally situated, but all along the main track, each municipal corporation being given for taxation a value dependent not upon the actual value of the property therein physically located, but only such value of the entire property of the corporation as the length of the main track in the municipality bears to the total length of the line. This method of distribution is said to be contrary to the rule that property must be taxed at its actual *situs*. But it is settled by a long line of decisions that this rule is merely the law of the state that recognizes it; hence being a matter of legislation it is entirely competent for the legislature, unless restrained by the constitution, to fix for the purposes of taxation the *situs* of both real and personal property."

The Arkansas supreme court regarding a similar question states the principle as follows:

"The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, and the complaint of discrimination is groundless." *St. Louis, I. M. & S. R. Co. v. Worthen*, 52 Ark. 529, 13 S. W. 254.

The supreme court of the United States in *Columbus S. R. Co. v. Wright*, 151 U. S. 470, 480, has said:

"The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the im-

provements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Again it is said by the supreme court of Wisconsin, in *State v. Anderson*, 90 Wis. 550:

"The utter impracticability, not to say impossibility, of treating it as real estate for the purposes of taxation, is illustrated, not only from the results that might follow tax sales, but in attempting to assess it as such under the provision that 'all real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies' (R. S. sec. 1039), and is well illustrated by the present case, where the property claimed to be real estate has a physical location in twenty-one assessment districts. How could it be entered on the rolls by lots and blocks, or by reference to plat or deed, or how otherwise, under secs. 1045 and 1046? It is part on and part in the soil, and part in the air. How are the twenty-one assessors to assess and value the tracts, ties, poles, trolley wires, etc., with certainty and in an intelligible manner in so many parcels? And are the twenty-one assessments to be followed by as many separate taxes and tax sales in case of nonpayment? It seems to us entirely clear that this property cannot be regarded as real estate for the purposes of taxation, and that it is not the 'land' and 'real property' described in these sections for assessment and taxation; and as already stated, it seems perfectly plain from the statute (secs. 1034, 1038, R. S.; ch. 285, laws of 1889), that this property is required by law to be assessed and taxed. * * * In view of the use made of the specific lots upon which the power houses

are situated, and upon a fair construction of the statute, and with a view to carry out its evident meaning, we hold that such real estate, thus devoted to such uses, is not the real property required by section 1039 to be 'entered upon the assessment roll in the assessment district where it lies'; it having acquired a peculiar character in the law by reason of having become a part of the entirety of a property subject only to assessment and taxation as an entirety, in the assessment district where the corporation owning it has its principal office and place of business."

We are satisfied upon principle and authorities cited that the legislature has not exceeded its powers in providing, as it has done, for the assessment of the property of a railway company as a unit, and the distribution of the value thus ascertained over the entire line of the railway assessed, and to the different tax districts and municipalities into which the roadbed or right of way extends on a mileage basis; that when the values are thus ascertained and apportioned and the distributive share assigned to any one district or municipality, such proportionate share legally represents the value of the fractional part of the entire property situated in such district or municipality for the purposes of municipal taxation, and that the fundamental law as to uniformity is not violated by such a scheme of assessment and distribution of values of the entire property.

It is also contended that the sections of the statute providing for an assessment of railway property by the state board of equalization is void because of the alleged deprivation of property by taxation without due process of law, in that no sufficient notice is given of the meeting of the state board of equalization when assessing such property. This question has been under consideration for some time and is disposed of in an opinion in the case of *Chicago, B. & Q. R. Co. v. Richardson County*, *post*, p. 482. On the authority of that decision these sections in respect of the objection urged against them of which we have just made mention must be held valid. The constitutionality of these

sections is also upheld in that opinion as to other objections herein discussed.

The application for a peremptory writ of mandamus should be denied, which is accordingly done.

WRIT DENIED.

LOUIS ZOBEL V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1904. No. 13,717.

1. **Criminal Law: APPEAL.** To render an appeal to the district court effective in a misdemeanor case, where conviction has been had in an inferior court, the defendant must enter into a recognizance, and with sureties, to be fixed and approved by the court or magistrate trying the case, as is provided by section 324 of the criminal code. A recognizance entered into by the defendant alone is insufficient to perfect a valid appeal.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

W. P. McCreary and *W. M. Crow*, for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown*, *contra.*

HOLCOMB, C. J.

Upon conviction of the defendant in the county court of a misdemeanor, he gave notice of an appeal, and in open court entered into a personal recognizance in the minimum sum provided by statute, but without sureties, for his appearance at the district court on the first day of the next regular term thereof. The county attorney moved to dismiss the appeal because the recognizance entered into for an appeal was not such as is required by statute. The motion was sustained, the appeal dismissed, and the defendant prosecutes error from the order of dismissal.

The sole question for consideration and determination

is whether the recognizance taken is such as is required by statute in order to appeal after conviction in a misdemeanor case, and is sufficient to effectuate a valid appeal, and give to the district court jurisdiction to entertain the charge and try the defendant in that court on the complaint filed against him. No objection is urged to the form or sufficiency of the recognizance, save that it was only the personal obligation of the defendant without sureties, and therefore not in compliance with statutory requirements, nor sufficient to perfect the appeal sought to be taken from the judgment rendered against the defendant in the county court.

The provisions relating to appeals in misdemeanor cases are doubtless for the benefit and advantage of those convicted of offenses of a minor character and, in order to perfect a valid appeal as contemplated by statute, there must be a compliance in all substantial particulars with the conditions upon which the right of appeal may be exercised. 5 Cyc. pp. 92, 94, secs. *b* and *c*. Of course the recognizance is for the benefit of the state, and to enforce the appearance of the defendant in the appellate court to answer the charge preferred against him. The holdings of the courts and in this jurisdiction especially are to the effect that such provisions are mandatory, and a failure to follow them in any material respect forfeits one's right to an appeal which, otherwise, he is entitled to. Section 324 of the criminal code declares that the defendant shall have the right of appeal, which shall be taken immediately upon the rendition of the judgment in a misdemeanor case. It is therein provided that no appeal shall be granted unless the appellant shall within 24 hours after the rendition of such judgment enter into a recognizance to the people of the state of Nebraska in a sum not less than \$100, and with sureties, to be fixed and approved by the magistrate before whom said proceedings were had, conditioned upon his appearance before the district court for the county at the next term thereof to answer the complaint against him. It is held by this court in *In re Newton*, 39 Neb. 757,

that in order to effectuate a valid appeal the defendant must within 24 hours enter into a recognizance as required by the section to which reference has been made; and in *Pill v. State*, 43 Neb. 23, it is ruled that the recognizance is invalid if the court where and before which the prisoner is to personally appear is not stated in the recognizance. In the case last cited, the substance of the decision is to the effect that the provisions of the statute are mandatory and must be complied with in all material respects, otherwise the recognizance is fatally defective and confers no jurisdiction upon the district court. To the same effect is *Kazda v. State*, 52 Neb. 499. It would seem from a reading of said section of the criminal code respecting appeals in misdemeanor cases, that the entering into a recognizance by the defendant, and with sureties, to be fixed and approved by the court is just as imperative as the provisions relating to the time the appeal must be taken, the time when the recognizance must be entered into, and the amount of the same. If one of the provisions may be departed from or ignored, then why not either of the others? If the sureties alone attempted to enter into a recognizance for defendant's appearance in the appellate court, it can hardly be doubted that the failure of the defendant to become a party thereto would invalidate the attempted appeal, and we cannot see any good reason, on the other hand, for disregarding the plain statutory provision as to sureties and holding that a recognizance is sufficient and in compliance with the statute when entered into by the defendant alone. Both provisions seem equally binding and mandatory, and a failure to comply with one would be as fatal as would be the failure to comply with the other. The case of *Smith v. State*, 35 Tex. Cr. App. 9, 29 S. W. 158, where it is held that a recognizance which fails to state which of the obligors is principal and which are sureties, as required by the criminal code of that state, is insufficient, is in principle analogous to the case at bar, and may be accepted as an authority in the disposition of the present case. It is there said:

"A recognizance is a statutory obligation, and its requisites are prescribed by the statute. In order to constitute it a legal obligation, it must be made in conformity with the law authorizing it to be entered into, at least in a substantial manner. Its very basic principle is that there must be at least one defendant, and there may be sureties, and the further plain provision is that this obligation must show the relation of the parties to the obligation they have undertaken, whether principal or surety. It must be stated who is principal and who are sureties. The court cannot supply such omissions by inference, presumption, or intendment. The recognizance must substantially comply with the law. Appeals in misdemeanor cases will be dismissed unless the recognizance substantially complies with the statute, and forfeitures cannot be enforced if the provisions of the statute are not complied with. The reports are filled with cases sustaining this proposition."

Our attention is called to section 388 of the criminal code which provides, in substance, that an action on any recognizance shall not be defeated by reason of any defect in the form of the recognizance, if it sufficiently appears from the tenor thereof at what court the party was bound to appear, and that the court or officer before whom it was taken was authorized by law to require and take such recognizance. It is argued that this section gives support to defendant's contention that the recognizance as taken in the case at bar is authorized, and sufficient to render the attempted appeal effective. We do not think this section has any material bearing on the question now under consideration. The defect here goes to the substance rather than to the form. The question is, has such a recognizance been entered into as the statute says must be given as a condition to the right of an appeal? May a defendant have more time or give a recognizance in a less amount than is provided by section 324, or give one without the sureties as therein provided? The answer, as has been indicated, must, we think, be in the negative.

We are also cited to some cases where recoveries have

been allowed on recognizances not in some respects in substantial compliance with statutes regulating the giving of the same, but in such cases elements of estoppel entered into the consideration of the questions decided, and these matters do not properly enter into the discussion or consideration of the question presented in the case at bar.

We are of the opinion that the recognizance entered into by the defendant was fatally defective, and that no error was committed by the district court in dismissing the appeal because thereof. The judgment of the district court should be, and therefore is,

AFFIRMED.

**THOMAS A. COLBURN, APPELLANT, v. JOHN W. McDONALD,
INTERVENER, APPELLEE.**

FILED OCTOBER 5, 1904. No. 13,444.

1. **County Bonds: REFUNDING: APPEAL.** Chapter 8 of the laws of 1899, commonly known as the "Refunding Bond Act," as found in chapter 9 of the Compiled Statutes of 1903, provides for an appeal from the findings of the district court as to the validity of county bonds sought to be refunded, and authorizes the supreme court to make a finding and decision in such a proceeding which is binding upon the county board, the protestant and other parties to the record.
2. **Procedure.** In such a proceeding we should attempt to do no more than render a decision as to the validity of the bonds, and thereby affirm or reverse the finding of the district court, as the case may be.
3. ———. It is not necessary in such a proceeding to determine the effect of the decision as to innocent purchasers of the bonds who are not parties to the record.
4. **Laws: ENACTMENT.** An enrolled bill found in the office of the secretary of state, signed by the officers of both branches of the legislature and approved by the governor, is *prima facie* evidence of its enactment.
5. ———: ———. "Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted." *State v. Frank*, 60 Neb. 327.

It is contended on behalf of the intervener, McDonald, that no appeal lies in these proceedings, and that therefore this court has no jurisdiction; and it is insisted that the question is determined by *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246. It is apparent, however, that the cases are distinguishable. The statute under consideration here authorizes an appeal to the supreme court from a decision of the district court, and provides the manner of taking such appeal. Notice thereof must be given at the time of the decision, and within 20 days the party appealing must give a bond in the sum to be fixed by the court; and the statute (sec. 39, ch. 9, Compiled Statutes, 1903, Annotated Statutes, 10781), then says: "If appeal in the foregoing manner is taken it shall stay proceedings on the part of such corporate authorities until such appeal is decided." So that the statute itself discloses the sense in which the word "appeal" is used. It appears that this statute has been compiled with, and that this court has jurisdiction to determine the questions presented herein.

It will be observed that this is neither an action at law nor a suit in equity, but is a special proceeding provided for by the terms of the refunding act above mentioned. Therefore our jurisdiction and all our powers herein are conferred and measured by the terms of the act itself. The county board is a proper party to this proceeding, and the protestant, together with the intervener, McDonald, are before the court. This gives us the power to examine the questions involved in this proceeding, and our judgment herein will be binding upon the parties to the record. We will therefore proceed to determine the questions involved in this controversy as to such parties without attempting to adjudicate the rights of those bondholders who are not parties to the record.

It is contended that the act of 1869 (laws 1869, p. 92), under the provisions of which the bonds in question were issued, was never legally or constitutionally passed by the legislature, and is therefore void. To support this con-

tention an abstract of the house and senate journals relating to the passage of that act is put in evidence. This copy or abstract fails to show in perfect form or order each successive step which occurred in the passage of the act, and in describing the bill its title was not always referred to in exactly the same language; but the journals do not show that the act, in the precise form in which it was signed by the chief officers of the house and senate and approved by the governor, was not passed. We think that it has finally become the settled law of this state that the enrolled bill signed by the officers of both houses and approved by the governor, as found in the office of secretary of state, is *prima facie* evidence of its due enactment. It is true that the legislative journals may be looked into for the purpose of ascertaining whether the law was properly enacted, but the silence of these journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. "Every presumption is in favor of the regularity of legislative proceedings; and it is rather to be inferred that the journals are imperfect records of what was done than that the legislature failed to perform the more solemn and important duties enjoined upon it by the constitution." So it must be made to affirmatively appear by the journals that the act in question did not pass. To hold otherwise would be to permit a mute witness to prevail over the *prima facie* case made by the bill itself. *State v. Frank*, 60 Neb. 327. The evidence introduced by the protestant being insufficient to show affirmatively that the act in question was not regularly and constitutionally passed by the legislature, this contention must fail.

It is next claimed that the act of 1899, under which this proceeding is prosecuted, was not constitutionally passed, and is therefore void. Answering this contention, we may say that the evidence introduced to support it is of the same kind and nature and of no more binding force than that introduced in relation to the passage of the act of 1869. It does not affirmatively show that the act was not

regularly and constitutionally passed, and the holding on this question must follow the rule announced above.

It is further claimed that the fact that the proposition on which the bonds in question were voted authorized the county to receive \$100,000 of the stock of the Midland Pacific Railway at the time of the delivery of the bonds rendered them void. An examination of the proposition contained in the record shows that the bonds were to be issued "to aid in the construction, extension and completion of the Midland Pacific Railway," and we are not, at this time, and in this proceeding, prepared to hold that the mere fact that the corporation was to and did deliver \$100,000 of its stock to the county, which it retained and sold, rendered the bonds void. The supreme court of the United States in the case of *Chicago, B. & Q. R. Co. v. County of Otoc*, 16 Wall. (U. S.) 667, held that there is no solid ground of distinction between a subscription to stock and a donation. It is not necessary for us to go that far in this opinion, because the proposition provided for a *donation* of the bonds to the railway company, not a stock subscription, and simply authorized the county to receive \$100,000 of stock. The bonds in the case above cited were issued under the act in question herein, and were declared to be a binding obligation on the county. We are therefore satisfied that the proposition in question was not void. 20 Am. & Eng. Ency. Law (2d. ed.), p. 1102; *Mayor and Aldermen of Wetumpka v. Winter*, 29 Ala. 651; *Nelson v. Haywood County*, 87 Tenn. 781, 11 S. W. 885.

It is further contended that there was an overissue of bonds, in this: That the bonds in question, together with the amount previously issued, exceeded 10 per cent. of the assessed valuation of the county. We find it stipulated in the record that the assessed valuation of Lancaster county for the year 1871 was \$3,184,036; that bonds in aid of works of internal improvement had been issued at that time to the amount of \$330,000. So it appears that, if the bonds had been actually issued in 1871, such issue would have amounted to more than 10 per cent. of the assessed valua-

tion of the county. But it also appears from the stipulation that the assessed valuation of the county for the year 1872 was \$4,482,117; that the bonds were issued during that year, bore date January 1, 1873, and were delivered about that time. It thus clearly appears that there was no overissue of bonds if the assessed valuation for the year 1872 should govern. The language of the act under which the bonds were issued is as follows: "That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city; *Provided*, The county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city." (Laws 1869, p. 92.) Construing this law in the case of *Chicago, B. & Q. R. Co. v. Dundy County*, 3 Neb. (Unof.) 391, we held that the time when municipal bonds were issued was when the municipality actually parted with their custody and control. It was held in the case of *Union P. R. Co. v. Board of Commissioners of Davis County*, 6 Kan. 256, that the vote authorizing the issuance of railway bonds was not the contract between the county and the railroad company; that such vote simply authorized the county board to enter into a contract, which was consummated and completed when the bonds were issued. In *Rathbone v. Board of Commissioners of Kiowa County*, 27 C. C. A. 477, 83 Fed. 125, it appeared that certain county bonds were issued under the laws of Kansas, which limited such issue to a certain proportion of the assessed valuation of the county. It was contemplated that the bonds should not be issued prior to December 31, 1887; none were issued until August of that year, and it was held that, under this state of facts, the assessment for 1887, made as of March 1 of that year, was the one that controlled. This rule finds support in *School District*

v. First Nat. Bank, 19 Neb. 89; *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56; *Bound v. Wisconsin C. R. Co.*, 45 Wis. 543; *Falconer v. Buffalo & Jamestown R. Co.*, 69 N. Y. 491; *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. 621. In the case at bar the proposition voted on did not contemplate that the bonds should be issued as of the date at which the vote was taken. They were to be issued and delivered from time to time as certain sections of the road were completed. They were in fact issued and delivered to certain trustees, to be turned over to the company at the proper time, just before the first of January, 1873. So, as a matter of fact, they were issued after the assessment of 1872 was made, and before the date of the assessment for the year 1873. According to the foregoing authorities the assessment of 1872 controls, and there was no overissue, as contended by the protestant.

If we are right in the foregoing conclusions, it is unnecessary to consider the other minor objections made to the validity of the bonds.

For the foregoing reasons, and in view of the further facts that the question of the validity of these bonds was put in issue by the pleadings in the suit between Lewis and Lancaster county in the circuit court of the United States for the district of Nebraska; that the suit was compromised; that in such settlement the county secured the benefit of the reduced rate of interest agreed upon therein; that it has ever since that time kept the interest on the bonds paid in full; and has paid and taken up a part of them, we are constrained to hold that the findings of the district court were right, and they are therefore

AFFIRMED.

SAMUEL ECCLES V. UNITED STATES FIDELITY & GUARANTY
COMPANY.

FILED OCTOBER 5, 1904. No. 13,646.

1. **Motion to Dismiss.** A motion to dismiss a proceeding in error will not lie on the ground that no motion for a new trial was filed in the trial court by the plaintiff in error, because this court will examine the record so far as is necessary to determine whether the pleadings sustain the judgment.
2. **Parties.** All parties against whom a joint judgment has been rendered must be made parties to a proceeding in error. But this rule has no application where the judgment complained of is several, and in favor of the defendant in error alone.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Motion to dismiss denied.*

A. Haráy, for plaintiff in error.

Hazlett & Jack, contra.

BARNES, J.

The plaintiff in error commenced this action against William H. Walker, a justice of the peace, on his official bond, and impleaded the United States Fidelity & Guaranty Company, his surety, to recover the statutory penalty for taking and receiving illegal fees. The bond company filed a general demurrer to the petition, which was amended by interlineation; it thereupon answered over, and the cause was tried in the district court for Gage county to a jury. A verdict was returned for the plaintiff; both defendants filed motions for a new trial. Walker's motion was overruled, and judgment was rendered against him on the verdict; and the motion of the surety company was sustained. Thereafter the cause proceeded against the said company alone, and a second trial resulted in another verdict for the plaintiff. Thereupon the company filed another motion for a new trial, which was sustained;

and also filed a motion for a dismissal of the case, notwithstanding the verdict which was likewise sustained, and the action, as to said company, was finally dismissed. To these rulings the plaintiff excepted and prosecuted error. The bond company has filed a motion herein to dismiss the error proceedings, and on this motion the cause is now presented for our consideration. The substance of the first ground of the motion is that this is an action at law; that it was tried to a jury on questions of fact, in support of which evidence was introduced; that the court sustained defendant's motion to dismiss, because the petition did not state facts sufficient to constitute a cause of action, and that the evidence failed to prove a cause of action against the defendant herein; and the plaintiff, having failed to file a motion for a new trial, cannot obtain a review of the judgment of the trial court. The action of the district court brought here for review is, in effect, a judgment on the pleadings; a judgment, notwithstanding the verdict, which was summarily rendered in favor of the defendant over the plaintiff's objections and exceptions. In such a case it is not necessary for the plaintiff to file a motion for a new trial in order to obtain a review of the proceedings, for this court will examine the record so far as it is necessary, to determine whether the petition states a cause of action; in other words, whether the pleadings support the judgment complained of. *Schmid v. Schmid*, 37 Neb. 629; *Scarborough v. Myrick*, 47 Neb. 794; *Farris v. State*, 46 Neb. 857. One of the grounds of the defendant's motion to dismiss the action in the court below was that the petition did not state facts sufficient to constitute a cause of action. The ruling on that point can be reviewed in this court without a motion for a new trial, and the case cannot be disposed of on a motion to dismiss the proceedings in error.

The second and last ground of the defendant's motion is that the proceedings must be dismissed for want of necessary parties; and it is contended that Walker, against whom a judgment was rendered in the court below, is

a necessary party defendant in this proceeding. This would be true if the judgment complained of were a joint judgment; in other words, if it were a judgment against the plaintiff in error and in favor of Walker and the defendant company jointly. Such is not the case. Walker is neither liable under, nor is he bound by, the judgment complained of, and therefore is not a necessary party herein. *Kuhl v. Pierce County*, 44 Neb. 584; *Farney v. Hamilton County*, 54 Neb. 797; *Collins Mfg. Co. v. Seeds Dry Plate Co.*, 55 Neb. 577; *Richardson v. Thompson*, 59 Neb. 299.

It follows that the matters involved in this controversy cannot be disposed of on an objection to the jurisdiction or a motion to dismiss the proceedings in error. For these reasons the motion should be, and the same is, hereby overruled.

MOTION OVERRULED.

GEORGE W. MAURER ET AL V. GAGE COUNTY.

FILED OCTOBER 5, 1904. No. 13,705.

1. **County Treasurers: COMPENSATION.** Section 42 of chapter 28 of the Compiled Statutes of 1901, which provides that in counties having more than 25,000 inhabitants the county treasurer shall receive a salary of \$3,000 a year, and such an amount as may be allowed by the county board as compensation for clerks and assistants, not exceeding \$2,400 per annum, also limits the sum which may be retained by the treasurer for all such purposes to the amount of the fees and commissions actually received and collected by him.
2. **County Board: POWERS.** The powers exercised by the county board in examining the accounts of and settling with the county officer in this case are ministerial only; and in so far as they allowed such officer to retain a greater compensation than that fixed and limited by law, their action is void, and the county is not bound thereby.
3. **Recovery From Officer.** In such a case the county may, in a proper action, recover from the officer the amount of the excess so allowed and retained by him.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. W. Sabin and Griggs, Rinaker & Bibb, for plaintiffs in error.

H. E. Sackett and H. E. Spafford, contra.

BARNES, J.

This action was commenced in the district court for Gage county against George W. Maurer, and the Fidelity & Guaranty Company of Maryland, on his official bond as treasurer of that county to recover the sum of \$1,388.76, alleged to have been retained by him for the payment of his assistants, in excess of the fees actually earned, received and collected by him as such officer during the term of his office. There was a trial to the court on an agreed statement of facts, which resulted in a finding and judgment for the county, from which the defendants bring error.

The court found the undisputed facts in substance as follows: That the county of Gage had a population of more than 25,000 inhabitants during the years of Maurer's official incumbency; that he was elected treasurer of Gage county for the term composed of the years of 1898 and 1899; that he duly qualified and held the office of county treasurer for said term; that the Fidelity & Guaranty Company of Maryland, George L. Platt and Lester L. Price were sureties on his official bond, which contained the usual provisions, and which was duly approved and accepted by the county board of Gage county; that during his term of office Maurer, as county treasurer, made out and filed with the county clerk, every three months, a quarterly report as required by the statute, showing the fees of his office and from what source obtained, and fully complied with the statute in that regard; that he made out and filed his semiannual statements in accordance with law, which showed the true condition of his office as county

Maurer v. Gage County.

treasurer; that for 2 years during which he held the office he received as total fees the sum of \$7,736.92, and out of this amount he retained the sum of \$6,000 as his personal salary, and the remainder of \$1,736.92 he credited to the general fund of the county; that out of said general fund he paid the help of the office, during said 2 years, the sum of \$3,125.68; that the amounts paid to himself as treasurer and to his clerks and assistants during said 2 years exceeded the fees and commissions of his office for that term by the sum of \$1,388.76; that the county board of the plaintiff county, after knowing all of the foregoing facts, made semiannual settlements with Maurer, and at the conclusion of his said term of office, with said knowledge, made a full and complete settlement with him as county treasurer, and allowed him \$6,000 as his salary, and all of the amounts paid by him to his clerks and assistants, as charged in his official report; and the county board made said final settlement a matter of record in regular and open session; that in making said settlement there was no fraud practiced, mistake made or imposition imposed, either by said county treasurer or the county board; that no more clerks and assistants were employed in the treasurer's office during said term than were actually necessary and were approved of by the county board; and no more money was retained by the treasurer, for the purpose of paying his clerks and assistants, than was actually paid to them, and that his office was run in an economical manner.

On these facts, as a conclusion of law, the court held that the county treasurer's office in the county of Gage is strictly a fee office; that Maurer as county treasurer was not entitled to any compensation for himself, his clerks and assistants beyond the fees earned, collected and paid out by him in discharging the duties of his office; that the settlement made with him as county treasurer by the county board, in so far as he was allowed any sum of money in excess of the fees actually received by him in his office as compensation for either himself or his clerks

and assistants, was absolutely void for want of power in the board to make such allowances. The court further found that the amount due from the defendants to the plaintiff county, including interest, was the sum of \$1,592.09, for which judgment was rendered against the defendants. It will be observed that the plaintiffs in error relied on the defense of settlement in the court below; and they now contend that the county board having settled with the treasurer quarterly, semiannually and finally at the end of his term, and having allowed him to retain the amount in dispute—although it is admitted that such sum was in excess of the amount of fees earned and collected by his office during the term in controversy—such settlement constitutes a complete defense herein, and the county cannot maintain the action. This is the only question presented for our consideration, and its determination requires a construction of section 42, chapter 28 of the Compiled Statutes of 1901 (Annotated Statutes, 9069), together with the legal effect of the settlement in question herein. The section in question provides:

“That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand (\$3,000) dollars per annum, and shall be furnished by the county commissioners the necessary clerks or assistants whose combined salary shall not exceed the sum of two thousand four hundred (\$2,400) dollars per annum. * * * That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred (\$700) dollars per year for each of such deputies or assistants, except in counties having a population over sixty thousand (60,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board; but in no instance shall such officers receive more than the fees by them respectively and

actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *and provided further*, that neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same necessary; and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

The statute above quoted, as it appears in the Compiled Statutes of 1901, clearly provides that in counties having more than 25,000 and less than 60,000 inhabitants the county treasurer shall receive a salary of \$3,000 a year, together with such an amount as may be allowed him by the county commissioners for assistant or clerk hire, not exceeding \$2,400 per annum, and he is authorized to retain such sum on express condition, however, that the fees actually earned and collected by him during the current term of his office are equal to or greater than those amounts. It thus appears that by positive provision of law the treasurer and his clerks and assistants can in no case receive more for their services than the amount of fees actually earned and collected by him.

It is strenuously urged, however, that the county board being invested with the power to settle accounts against the county, the settlements pleaded and established in this case are binding on the county, and that it is estopped thereby from prosecuting this action. We are not without authority on this question. In *Mitchell v. Clay County*, 69 Neb. 779, it was held:

"When the law commits to an officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial. * * * County commissioners act *quasi* judicially in passing upon claims against the county whenever their action is not merely a formal prerequisite to the issuance of a warrant, but in-

volves the determination of questions of fact upon evidence, * * * or the exercise of discretion in ascertaining or fixing the amount to be allowed. But they have no judicial power or discretion as to interpretation of the law. * * * Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only. * * * The action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article I, chapter 18, Compiled Statutes, 1901, is ministerial only."

In that case all of our former decisions on this question are reviewed, compared and distinguished, and as a result of such review the foregoing rules were announced. We are satisfied with the reasoning contained in the opinion in that case, and are thereby firmly committed to the rule that a county board has no power to settle with a county officer, and allow or pay him any greater sum as fees or salary than the amount fixed by law, because in so doing the board would, in effect, fix the fees of the officer, usurp an authority nowhere delegated to it by law, and thus abrogate the plain provisions of the statute. It is clear that in making such settlements county boards act in a ministerial capacity only, and if they exceed the authority conferred on them by law, by allowing fees to county officers in excess of the amount fixed by statute, such settlements are void, and constitute no defense to an action brought by the county to recover such excess allowed thereby. *Hazlet v. Holt County*, 51 Neb. 716; *Bush v. Johnson County*, 48 Neb. 1; 32 L. R. A. 223; 58 Am. St. Rep. 673.

This holding in no way conflicts with the rule laid down in our former decisions, wherein it is held that a settlement with a county board of all matters wherein a judicial discretion is or may be exercised is binding on the county, and unless set aside on appeal or error will, in the absence of fraud or mistake, constitute a complete defense to any action where the matters embraced in such settlement are involved.

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For the foregoing reasons, we hold that the judgment of the district court was right, and the same is hereby

AFFIRMED.

**DELLA MCLEAN, ADMINISTRATRIX, v. OMAHA & COUNCIL
BLUFFS RAILWAY AND BRIDGE COMPANY.***

FILED OCTOBER 5, 1904. No. 13,602.

Directing Verdict. In an action by an administratrix to recover damages for the death of the decedent, alleged to have been caused by the negligence of the defendant, it is *held*, upon an examination of the record, that the court rightfully directed a verdict for the defendant because of the contributory negligence of the deceased.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

Charles S. Lobingier, T. J. Mahoney and N. A. Crawford,
for plaintiff in error.

W. J. Connell and John L. Webster, contra.

AMES, C.

This is an action by an administratrix to recover damages from the defendant for having, as it is alleged, negligently caused the death of the decedent. The answer, besides denials, pleads contributory negligence. The defendant owns, maintains and operates a system of street and interurban electric railroad in and between the cities of Omaha and Council Bluffs. Double tracks of the railroad extend through "Avenue A" in Council Bluffs from the intersection of the latter with 14th street, in or near the settled part of the city, in a nearly direct line to a point at or beyond the corporate limits at a distance of two miles or thereabouts from the intersection. The scene

* Rehearing allowed. See opinion, p. 450, *post*.

of the accident is on "Avenue A" in a sparsely settled outskirts of the town, from a mile to a mile and a half from 14th street. At that place the avenue had not been brought to a regular grade, and there was no pavement or sidewalk, but there was a traveled wagon way alongside the railway, apparently not much used by the public. The street railway rails were of heavy steel, of the T pattern, laid upon exposed ties from eighteen inches to two feet above the surface of the ground adjacent to the right of way, so that the roadbed presented the general appearance of that of an ordinary commercial railroad in a rural neighborhood. The avenue was unlighted and the accident happened at about 20 minutes past twelve o'clock of a dark and cloudy night. What occasion the deceased had for being in the locality, or where or when he went upon the roadbed is not known, but he was walking toward the west, on or near the outer rail of the track used by cars moving in the same direction, and, at a point about midway between two streets intersecting the avenue, he was struck by one of the defendant's cars approaching from the east, thrown violently into the air, and instantly killed.

The specific negligence charged is that the car was negligently and carelessly propelled and managed, and that the defendant's agents and servants in charge of it failed to give the usual and ordinary signals of approach, or to employ the usual appliances to prevent the accident, and that "had proper and usual precautions been taken and the proper and usual appliances been employed" the deceased "could and would, by the exercise of diligence and care, have been seen by the defendant's agents and servants in charge of said car in time to have stopped said car before the same struck" the deceased. It is also alleged that the car was being propelled "at a high rate of speed," but the rate of speed is not charged to have been excessive or negligent, or to have contributed unduly to the casualty. Indeed, such an accusation would have been somewhat inconsistent with the claim that, by the exercise of proper care and diligence, the deceased could

and would have been seen, and the car stopped in time to prevent striking him.

The allegation that there was a lack of proper and usual appliances is not substantially supported by evidence. All that the record discloses in that regard is the vague assertion of some of the witnesses that the headlight appeared to them to be dim, but the degree of its brilliance is not attempted to be described, and that one was burning is not disputed. The car itself was brilliantly lighted by electricity, so as to illuminate surrounding space to a distance of several rods in every direction. No one but the motorman is shown to have been in charge of the car, and he was not produced as a witness. What he knew or did about the matter is unknown except his statement, made at the time and admitted in evidence as a part of the *res gestæ*, that he saw the deceased walking on the roadbed near the outer rail of the track and supposed he would get off, but that he, the deceased, did not have time. How far apart were the car and the deceased when the latter was first seen by the motorman is not shown, so that it is impossible to say whether, after that time, there was opportunity for stopping the car and thereby preventing the accident. There is evidence from which it may be inferred that a gong was not sounded nor other signal given after the discovery of the deceased, but it may also be inferred that the discovery and the collision were so nearly simultaneous that opportunity for so doing was wanting.

"A high rate of speed" in an outlying district is not complained of by the petition as negligent. How high it was cannot be ascertained from the evidence, which upon this point is conjectural. The witnesses vary in their estimate from the ordinary rate of 12 miles an hour to 20 and 30. No two of them exactly agree. At the middle rate of 20 miles an hour the car was moving about 30 feet a second. Within what distance it could have been stopped may be inferred from the fact that it was stopped, apparently as soon as possible, after the happening of the

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accident, but run 150 feet or more after that event. If under the pleading and evidence the motorman can be charged with negligence, it is for lack of vigilance enabling him to discover the deceased sooner. But the night was dark, and the street was unlighted, and it is not claimed that the illumination from the car or headlight extended, or ought to have extended, more than 150 feet from the car, a distance that, at the supposed rate of speed, would have been covered in five seconds.

The evidence was all offered by the plaintiff and is, of course, free from conflict. When she rested, the court, upon motion, directed a verdict for the defendant, upon the expressed ground that the deceased was a resident of the city of Council Bluffs and familiar with the scene of the accident and with the manner in which the defendant operated its trains, and that he was negligent in walking upon the track of the railroad without keeping a vigilant lookout for cars which he knew were likely to approach him from behind; and that the car which caused his death might, with ordinary care, have been seen approaching for more than a mile before it reached the place where the accident occurred. The plaintiff prosecutes error, but after a careful examination of the record we are convinced, contrary to our impression at the close of the argument, that the opinion of the learned trial judge was right, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

The following opinion on rehearing was filed April 19, 1905. *Former judgment of affirmance adhered to:*

1. **Directing Verdict.** On a motion to direct a verdict for the defendant, the plaintiff is entitled to every inference which the

Jury would have been warranted in drawing from the evidence adduced.

2. **Personal Injuries: ACTION: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** In an action for personal injuries, where contributory negligence is relied upon as a defense, and where, from the facts and circumstances proved, reasonable minds may draw different conclusions concerning the negligence of the plaintiff's intestate, such question should be submitted to the jury.
3. Evidence examined, and held not sufficient to bring the injury within the reason of the "humane doctrine" or "last chance."

OLDHAM, C.

The former opinion in this case is officially reported *ante*, p. 447.

A rehearing was granted for the further consideration of the question as to whether, under all the facts and circumstances surrounding the injury as shown by the evidence offered by plaintiff in the trial of the cause in the district court, the trial court was justified in directing a verdict for defendant on the doctrine of contributory negligence; and also for the purpose of further examining plaintiff's contention that the facts and circumstances surrounding the injury, as shown by plaintiff's evidence, brings the case within the reason of the "humane doctrine" or "last chance."

We agree with plaintiff's contention that, on a motion to direct a verdict for the defendant, the plaintiff is entitled to every inference which the jury would have been warranted in drawing from the evidence adduced. Now, it is clearly proved that at the point where the injury occurred there were two lines of defendant's street railway tracks, running east and west, and that there was a space of a few feet between and separating them. It was also proved that the north line of track was used by the cars going west, and that the south line of track was used by the cars going east. It was also shown by the testimony that the deceased was familiar with the running of these cars, as he had resided for a long time in Council Bluffs,

and passed over these car lines in going to and from his place of business in Omaha two or three times a day. The trial judge concluded from this testimony that deceased was clearly negligent in walking westward on the north track without looking behind him for an approaching car, because he must have known that the west bound cars used this track. This is perhaps a legitimate conclusion under the facts and circumstances proved.

It is also in evidence that the accident occurred after midnight, and was caused by the car making the last run for that night, which was then from 8 to 10 minutes behind time. Now, it is urged by counsel for plaintiff that if it was proper from the evidence introduced to impute to the deceased knowledge of the track on which the west bound car was accustomed to run, it was also competent to impute to him knowledge of the fact that the last car going west that night would, if on time, have passed the place where the injury occurred 5 or 10 minutes before the injury; and that this fact, if believed by the jury, might excuse him from the imputation of contributory negligence in not looking behind him for an approaching car coming from the west. If this directed verdict stood only on the doctrine of contributory negligence imputed to deceased for walking westward on defendant's north track at the time the injury occurred, without looking behind him for an approaching car, I would incline to the opinion that such question was one of fact for the jury, rather than one of law for the court. Contributory negligence is an affirmative defense in actions for personal injuries of this nature, and where reasonable minds may draw different conclusions from the conduct on which negligence is predicated, such question is for the determination of the jury and not of the court.

We have carefully reexamined the evidence contained in the record to see whether or not it tends to show any fact or circumstance that would bring the case within the reason of the "last chance" doctrine. This doctrine, as applied to this case, is based on the duty which the de-

defendant would owe on discovering the deceased in a perilous position, from which he apparently could not and would not escape, to use every reasonable means at the command of the servants in charge of its cars to stop the car for the purpose of avoiding the accident. This doctrine has found favor in this court, and was recently applied in the case of *Omaha Street R. Co. v. Larson*, 70 Neb. 591. We do not understand that it is the duty of the operators of a street railway car to stop the car as soon as they see a foot passenger occupying the track in front. We think that ordinarily the motorman may proceed toward such foot passenger on the presumption that such passenger will step off the track before the car reaches him, until it becomes apparent that for some reason such passenger, either on account of deficient hearing or other inability to apprehend his danger, cannot and probably will not be able to get off the track; and that then it becomes his duty to use all reasonable means at his command to stop the car. Now, the evidence in the case at bar wholly fails to show that the motorman, after discovering the perilous position of the deceased, could, by the use of all means at his command, have stopped the car and thereby avoided the accident. Consequently, we do not think that the evidence in the record brings this case within the reason of the "humane doctrine," nor do we find any competent evidence in the record to show actionable negligence on the part of the defendant which was the proximate cause of the injury. From a reexamination of the record, the accident appears to us to fall in that class of casualties frequently met in life, in which there is a serious injury sustained for which no one is legally to blame.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

AFFIRMED.

ALGERNON S. PATRICK, EXECUTOR, v. ELIZA B. PATRICK.

FILED OCTOBER 5, 1904. No. 13,612.

Wills: DECEDENT'S DEBTS: PAYMENT: SETTLEMENT OF ESTATE. A testator devised lands in fee to his wife in lieu of dower and of her distributive share in his estate, that at the time of the execution of his will were free from incumbrance. Afterwards, he mortgaged them to secure his personal obligation. The will provided expressly that all his debts should be paid out of his personal estate. The mortgagee did not prove his claim in probate proceedings, but the county court, by order, directed the executor to pay the mortgage debt, which he did. *Held*, That upon final settlement of his accounts he was entitled to be credited with the sum so expended.

ERROR to the district court for Douglas county: WIL-
LARD W. SLABAUGH, JUDGE. *Reversed*.

Robert W. Patrick and Isaac E. Congdon, for plaintiff
in error.

Byron G. Burbank, contra.

AMES, C.

In 1888, Mathewson T. Patrick, a resident of the city of Omaha and the owner of a considerable estate therein, and elsewhere in Nebraska, executed his last will in which he provided, in the first instance, for "the payment of his funeral charges, the expenses of administering his estate, and all his debts, out of his personal property." Secondly, he devised and bequeathed a dwelling house property, described as lot 6 in block 56 in the city of Omaha, then owned by him and unincumbered, to his wife in fee, together with certain household property, and an annuity of \$1,000 to be charged upon the residue of his lands and paid during her widowhood. These provisions were expressed to be "in lieu of her dower and of any distributive share in my estate to which she might otherwise be entitled." The residue of his estate, real and personal, he

bestowed upon his children; and he nominated his brother, Algernon S. Patrick, as sole executor of his will, and as guardian of his children.

In 1896 he executed his interest bearing promissory note to the National Life Insurance Company of Vermont for the principal sum of \$10,000, and as security for its payment executed, together with his wife, a mortgage upon the above mentioned lot 6, together with an adjoining lot also owned by him. In 1899 he died seized of these lots and of a considerable additional estate, and still owing the principal of the mortgage debt. The widow elected to take under the will, which was duly admitted to probate, and Algernon S. Patrick duly qualified as executor and guardian. The usual orders were made and notices published for the presentation of claims, and on the 23d day of September, 1899, after the lapse of time prescribed by law and fixed by order of the court, an order was duly entered barring all claims not theretofore filed, among which was the above mentioned \$10,000 note. Among the claims that were so presented and properly allowed were certain notes called the Kuhns' and Collins' notes. From the orders allowing them no appeal was taken. On the 11th day of November, 1901, the executor having come into the possession of sufficient personal estate of the deceased for the payment of the claims allowed by the court, and expenses of administration, the county court, on his application, made and entered the following order:

"This matter coming on to be heard on the petition of the executor, Algernon S. Patrick, to be directed by the court to pay to the National Life Insurance Company of Montpelier, Vermont, the sum of ten thousand (\$10,000) dollars, together with interest thereon at the rate of six per cent. per annum from the first day of September, A. D. 1901, and the guardian *ad litem* being present in court, and the matter being heard upon the evidence and the law, it is hereby ordered, adjudged and decreed that the said executor pay the sum of ten thousand (\$10,000) dollars, together with interest at the rate of six per cent.

per annum from the 1st day of September, A. D. 1901, to the said National Life Insurance Company of Montpelier, Vermont."

As is indicated by this order, upon the making of the application for it, a guardian *ad litem* had been appointed for the heirs, who were minors, and he participated in the proceedings. In compliance with the order, the executor paid off and discharged the mortgage debt. On the 9th day of January, 1902, the executor having paid and satisfied the claims allowed by the court against the estate of the deceased, rendered a final account, and prayed to be discharged from his trust.

At and for many years prior to the death of the testator, he and his brother, the executor, had constituted a partnership, owning a large amount of real and personal property, and engaged in the business of farming and the raising of live stock. When application was made for passing the final accounts of the executor, as above mentioned, the guardian *ad litem* and the widow filed separate exceptions thereto. On the hearing, the county court disallowed all the exceptions and granted the application of the executor, and by the same order relieved him of his trust as guardian, and substituted the widow in his place therein. The widow accepted the guardianship, but in her own behalf and in behalf of the minors appealed to the district court from the remainder of the decree. In the district court there was a trial to a jury, who returned a verdict against the executor for the sum of \$2,287.74, upon which a judgment was rendered against him, to reverse which he prosecuted a petition in error in this court.

For some reason not made known to us, the briefs of counsel in this court described the parties as appellant and appellee, and the cause was argued by counsel as though it had been brought here by appeal; but, both because such procedure is inconsistent with the record and because there appears to us to be grave doubt, in view of the decision of this court in *Nebraska Wesleyan University v. Craig's Estate*, 54 Neb. 173, whether jurisdiction

can be acquired here by appeal, we shall treat the case as a proceeding in error.

The principal errors urged in brief and argument are that the trial judge, by his rulings and instructions at the trial, and by his judgment upon the verdict, denied to the executor credit upon his account for the payment of the \$10,000 mortgage upon the homestead and of the Kuhns' and Collins' notes, and we shall confine what further we have to say to these items. As to the notes, it appears to us that but little need be said. They were executed by the testator and were unpaid at the time of his death, and were regularly proved before, and allowed by, the county court in the due course of administration. No objection was made, nor appeal taken, by or on behalf of the widow or children, and there is no accusation of fraud or lack of good faith in connection with them or with these proceedings. It was, indeed, alleged on the trial in the district court, and is urged here, that the notes were given for money which was borrowed for, and which was actually devoted to, the uses of the partnership, and that the funds of the latter ought to have been devoted to their payment. This fact, however, if it be a fact, would not have been a defense to the maker if he had been sued upon them in his lifetime, and, of course, his death clothed it with no new or additional importance. It is merely a matter to be taken into account upon a settlement of the partnership affairs between the surviving partner and representatives of the deceased.

As respects the mortgage to the life insurance company, the same claim is made as with respect to the notes and it should, of course, be disposed of in the same way; but it is further urged that this alleged debt never was presented or proved before the county court for approval or allowance, nor established in any manner as a valid claim against the estate, and that the executor was therefore wholly without authority or justification for its payment; and to the suggestion by the executor that the will expressly provides for the payment of all the debts of the

testator out of his personal estate, it is replied that, in the absence of proof and allowance by and before the county court, there is no competent evidence that the mortgage claim was a debt of the testator or is a valid charge against his estate. In support of this contention counsel cites *Huebner v. Sesseman*, 38 Neb. 78, construing and upholding the statute which makes the proof and allowance of claims in the manner mentioned the sole justification of an executor or administrator for their payment, and a large number of decisions from other states to a like effect. The correctness and authority of these decisions is not disputed by the plaintiff in error, nor doubted by ourselves, but it is found upon examination that they all have reference to alleged indebtedness of the testator not secured by mortgage on his real estate, or to deficiencies remaining after the exhaustion of such security. In the case before us there are two circumstances not present, or at least not adverted to, in the cases cited: *First*, an expressed intention of the testator that the indebtedness should be paid out of his personal estate; and, *Second*, the fact that the incumbered property was worth considerably more than the amount of the mortgage lien. The proof and allowance of the debt would have been the occasion of some expense and annoyance to the mortgagee, which it could safely avoid by reliance upon its security, and which there were no means of coercing it to incur. The contention of the defendant in error amounts, therefore, to saying that it lay within the power of the mortgagee, by mere inaction, to defeat the expressed intent of the testator. This is a conclusion to which we suspect that the court would, in the absence of authority, arrive with great reluctance, if at all. But it is in conflict with two well recognized principles whose united weight is sufficient for its overthrow. The first, in support of which it is not necessary to cite authority, is that it is the chief duty of courts and executors to carry into effect the intent of a testator, and the second is that it is the presumed intent of a testator, whether expressed in his will or not, that a

devisee of lands shall take them free from incumbrance and that even undevised lands shall be freed from incumbrances out of the personal estate, if there shall be sufficient of the latter for that purpose. Authorities go even further, and hold that, if an administrator of an intestate estate negligently permits real estate to be sacrificed for the satisfaction of liens which there is sufficient personal estate to discharge, he may be liable to the heir for waste. Thus says Dame, Probate and Administration, page 302:

"It is an old established rule of law that an administrator has the right to satisfy a mortgage debt from the personal assets of the estate, thus relieving the realty from the incumbrance; and it has been held that the heir may compel the application of the personalty to the discharge of a mortgage, unless he disposes of his entire interest in the estate or in the realty. There is little to be gained from such a course. The heir might just as well receive his share in cash, and apply it to the satisfaction of the mortgage, as to compel the personal representative to pay it. In regard to testate estates, the rule is necessarily different, the will often containing provisions setting apart certain property for the payment of debts, or a clearly expressed intention that the devisee should take subject to the incumbrance. If it clearly appears from the terms of the will that it was the intention of the testator that the devisee should take subject to the incumbrance, the personal estate cannot be used for that purpose; otherwise the same rule applies as in the case of intestate estates; and the same would be true of the payment of vendors' liens upon the realty. Taxes upon the realty accruing previous to the death of the decedent should be paid from the personalty. Those accruing after his death are a charge upon the land, and the heir or devisee takes subject to them, and the statute does not require them to be paid by the personal representative."

2 Woerner, American Law of Administration (2d ed.), sec. 518, says:

"Disbursements in Respect of the Real Estate. The executor or administrator is bound, whenever he is lawfully in charge of real estate of the decedent, to exercise the same diligence and prudence in its preservation and protection as if it were personal property in his hands. Hence they should be allowed credit for all disbursements, made prudently and in good faith, for necessary repairs, insurance against loss by fire, municipal assessments, and in discharging mortgages or other incumbrances upon the same, or interest thereon, or in redeeming lands sold for the nonpayment of taxes, not including, of course, such penalties and expenses as are occasioned by the negligence of the administrator. So also with respect to taxes; the executor or administrator should pay them and receive credit therefor whenever accruing while the real estate itself is lawfully in charge or under his control; and even when not, it seems to be generally held that he should pay such taxes as were assessed against the deceased and due in his lifetime, constituting a lien at the time of his death, and a liability of the estate, and this although such claim be not probated against the estate."

These opinions of text writers appear to be fully sustained by judicial decisions. *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772; *Richardson v. Hall*, 124 Mass. 228; *Hoff's Appeal*, 24 Pa. St. 200; *Burnett v. Lyford*, 93 Cal. 114, 28 Pac. 857; *Sutherland v. Harrison*, 86 Ill. 363. This last is a very instructive case, a very considerable number of authorities being collected and quoted in the opinion. The rule of law is very old and well established and seems to be subject to a single exception in the American courts, namely, the case of the purchase of an estate incumbered for debt for which the deceased did not become personally liable. How universal in its application, or how well grounded in principle, this exception may be, it is not to the present purpose to inquire. The incumbrance that was discharged by the executor in this case covered property devised to the children, as well as that devised to the widow, and its payment was beneficial rather than in-

jurious to both. In no view can the payment be regarded as a tortious misapplication of funds by the executor, who derived no personal benefit from it. At the worst it would have been no more than an unauthorized conversion of personal into real property, and the devises and bequests to the children being residuary in their character, they have suffered no injury by reason of it. For there can hardly be a doubt that, as between them and the widow, the latter would have been entitled to have the estate devised to her exonerated from the burden. The payment neither devastated the estate, nor diminished the residuum.

We suppose the real motive of the appeal to the district court and the proceedings in this court to be a desire to shift the obligation to the partnership estate of Patrick Brothers. But we think this is not the proper course for the pursuit of that object. The will provides for the perpetuation of the partnership for a term of 5 years after the death of the testator, which term expired in February of the present year. There was a special administrator appointed to represent the interests of the testator in the partnership, and the business was continued after his death in much the same manner as had been done before. Upon the final dissolution of the firm and the winding up of its affairs, an accounting may be had, and the rights and obligations of the parties in interest ascertained and adjusted in like manner as in other such cases.

For the foregoing reasons, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

F. V. HALVERSTADT ET AL., APPELLANTS, V. FRED BERGER,
APPELLEE.

FILED OCTOBER 5, 1904. No. 13,618.

Liquor License: APPEAL. A final order by a district court rendered upon appeal from an order of a village board, granting or refusing a license to sell intoxicating liquors, is not reviewable upon appeal by this court.

APPEAL from the district court for Dawson county:
CHARLES L. GUTTERSON, JUDGE. *Dismissed.*

H. D. Rhea, for appellants.

Warrington & Stewart, contra.

AMES, C.

A village board overruled a remonstrance to a petition for a license to sell intoxicating liquors and granted the license. The remonstrators appealed to the district court, by whom the action of the board was approved and affirmed, and from this order an appeal was taken to this court, where it is objected that the proceeding is not reviewable by appeal. The question has never been decided here, but it was mentioned and a doubt expressed about it in *Livingston v. Corey*, 33 Neb. 366. There is no especial provision by statute for the review of such orders in this court, but by section 582 of the code it is enacted: "A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors appearing on the record." It is quite clear that such a proceeding is not a "civil case" within the meaning of section 24, article I of the constitution, and if the question were deemed an open one, the writer would not hesitate to hold that a final order in such a proceeding is not reviewable in this court at all. The granting or refusal of a license to sell liquors is the exercise of a purely police regulation, involving no personal

Pine v. Pine.

or property right, and largely discretionary with the licensing authority; and the district judge, in deciding an appeal in such cases, performs an administrative rather than a judicial function. If the license is refused the applicant, in contemplation of law, loses nothing, and if it is granted he acquires a brief privilege, which will expire before the proceeding can be presented to this court for review, so that in any event this court can have before it nothing but a mooted question of no personal or pecuniary importance to the parties. But, however this may be, analogy with the decision of this court in *Nebraska Wesleyan University v. Craig's Estate*, 54 Neb. 173, is conclusive to the effect that the order complained of is not reviewable here by appeal, and it is therefore recommended that the appeal in this case be dismissed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the appeal in this case be

DISMISSED.

CHARLES C. PINE V. NETTIE S. PINE.

FILED OCTOBER 5, 1904. No. 13,676.

Divorce: JURISDICTION. When the plaintiff in a divorce suit has resided in this state the full statutory period and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of all the issues between them upon their merits and according to equity, even if, in order to do so, it is necessary to grant a divorce to a nonresident defendant upon a cross-petition.

ERROR to the district court for Dodge county. CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

George L. Loomis, for plaintiff in error.

F. W. Vaughan, contra.

AMES, C.

This is an action for a divorce begun by the wife in the district court for Dodge county. It is not disputed that she had been a *bona fide* resident of the state for the period required by statute, or that the court had jurisdiction of her petition. Due service by publication was had upon the husband, who was a nonresident of the state. He entered a personal appearance and filed an answer and cross-petition denying the material allegations of the petition, except the marriage, and praying a divorce in his own behalf because of offenses alleged to have been committed by the plaintiff. The court found the petition of the plaintiff to be false, and dismissed her action, and found the accusations of the defendant to be true, but dismissed this cross-petition also upon the sole ground that, because of his nonresidence, the court was without jurisdiction of it. The defendant prosecutes error.

The contention of the defendant in error is that the husband, in this instance, is within the literal prohibition of section 8, chapter 25 of the Compiled Statutes, 1903 (Annotated Statutes, 5330), which reads: "No divorce shall be granted unless the complainant shall have resided in this state for six months immediately preceding the time of filing the complaint, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage to the time of filing the complaint." The question thus raised has never been explicitly decided in this state, but it has been held that a divorce may be granted to a defendant upon cross-petition, and such seems to have been hitherto the general understanding of the courts and practitioners in this state. *Berdolt v. Berdolt*, 56 Neb. 792. And in *Atkins v. Atkins*, 13 Neb. 271, a decree of divorce in favor of a nonresident cross-petitioner was affirmed, although the precise point now suggested does not appear to have been presented by counsel and is not mentioned in the opinion.

Section 11 of chapter 25, Compiled Statutes, 1903 (An

notated Statutes, 5334), enacts that "suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity"; and in Michigan, whence the chapter seems to have been derived, it was held in *Clutton v. Clutton*, 108 Mich. 267, 31 L. R. A. 160, that a nonresident cross-petitioner may, in a proper case, be granted the relief prayed. There is in force a similar statute in Illinois, and the Michigan court quotes with approval the following language from a decision, *Sterl v. Sterl*, 2 Ill. App. 223, which we also adopt: .

"It is insisted by the appellee, that under the provisions of the above section of the statute the appellant had no right to file her cross-bill, praying amongst other things, for a divorce, for the reason that she was not a resident of this state, and that fact appearing on the face of her cross-bill, he could avail himself of such fact of non-residence by way of demurrer. * * * It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject matter of the suit will retain and exercise such jurisdiction, until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having, as he had a legal right to do, filed his bill against appellant praying relief and summoning the appellant into the court. When she is thus brought in, and having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant to her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee, that by reason of the arbitrary provisions of the statute, there is no escape from this dilemma, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding

obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims, that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court, at the suit of the appellee, and, as may be presumed, against her will. We think that by the plainest principles of equity the appellee is, under such circumstances, precluded from questioning the jurisdiction of a court which he has himself invoked; and that the court having acquired jurisdiction of the subject matter, and the parties to the suit at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider and determine all the equities of the parties to the end that complete justice may be done to all in the same case."

We also adopt the opinion of the supreme court of Michigan that it follows that it is a reasonable construction of our statute that, where the plaintiff in a divorce suit has resided in this state the full statutory period, and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of all the issues between them upon their merits and according to equity, even if in order to do so it is necessary to grant a divorce to a nonresident defendant upon a cross-petition.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree upon the cross-petition as therein prayed.

LEITON and OLDFHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree upon the cross-petition as therein prayed.

JUDGMENT ACCORDINGLY.

CHARLES F. HORNER V. GEORGE B. HUGHBANKS.

FILED OCTOBER 5, 1904. No. 13,603.

Evidence examined, and held sufficient to sustain the judgment of the trial court.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

Warrington & Stewart, for plaintiff in error.

J. H. Linderman and Geo. C. Gillan, contra.

OLDHAM, C.

This was a suit by plaintiff in the court below to recover the purchase price of corn alleged to have been sold and delivered to the defendant for the agreed price of 23 cents a bushel. The issues were tried to a jury in the court below, and a verdict returned for plaintiff as prayed in his petition, and defendant brings error to this court. The only alleged errors called to our attention in defendant's brief are that the evidence is not sufficient to sustain the verdict, and that the instructions of the trial court were not warranted by the testimony. As there is no complaint about any of the instructions misstating the law, we shall treat the two assignments of error together, and proceed to an examination of the testimony contained in the bill of exceptions.

It appears without dispute that plaintiff in the court below was a tenant on a farm situated in Dawson county, which defendant purchased in the spring of 1903, and before the expiration of plaintiff's lease; the defendant purchased the unexpired lease of the farm from plaintiff, and arranged to take possession from the 1st to the 10th of April, of that year; that this arrangement and agreement was entered into in the month of March, and that there was considerable standing corn on the farm at this time, which the plaintiff was proceeding to gather before

delivering possession of the place; that certain corn was standing on a wheat field of about 50 acres; that defendant suggested to plaintiff that it would injure the wheat to gather the corn at this time as the ground was muddy, and suggested to him that he and his tenants could possibly use 400 to 500 bushels of the corn standing in the wheat field; and it was agreed between the parties that either defendant or his tenant would go on the land and husk the corn from two rows, and measure that amount, and estimate the remainder of the corn by multiplying the number of rows by the average yield of the two rows measured; and for this corn defendant was to pay 23 cents a bushel. About the price and the manner of estimating the quantity of growing corn there is no dispute between the parties; nor is there any dispute that defendant sent his tenants to measure the corn growing in the manner agreed upon; and there was by this agreed estimate 572 bushels of corn on the wheat field. It is also in evidence that defendant took possession of the premises on the 9th of April, and that all this corn was left on the wheat field by the plaintiff. It is also undisputed that defendant gathered all this corn after taking possession of the premises; but defendant contends that while he said he could use 400 or 500 bushels of corn, yet that he only agreed to take 100 bushels at the price and under the estimate agreed upon, and that when he gathered the corn he separated the amount taken from the wheat field into two bins, reserving all in excess of 100 bushels for the plaintiff, and that he had tendered plaintiff \$23 for 100 bushels of corn which he had kept for himself. On the contrary, the plaintiff and his brother testify that the defendant agreed to take all the corn in the wheat field on the agreed terms before set out. In this condition of the record we think there was much competent testimony to sustain the verdict of the jury, and we therefore recommend that the judgment of the trial court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NATIONAL BANK OF COMMERCE, APPELLEE, v. EDITH R.
CHAMBERLAIN, APPELLANT.

FILED OCTOBER 5, 1904. No. 13,608.

1. **Review.** Issues in the district court examined, and *held* reviewable, on appeal, by this court.
2. **Homestead rights** cannot be divested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband.
3. **Homestead: ABANDONMENT.** Both an intention to abandon and an actual abandonment must concur in order to show an abandonment of the homestead.
4. ———: **ALIENATION.** A homestead is not a subject of fraudulent alienation.

APPEAL from the district court for Johnson county:
JOHN S. STULL, JUDGE. *Reversed with directions.*

Halleck F. Rose, W. B. Comstock, and Ed M. Tracy,
for appellant.

S. P. Davidson, contra.

OLDHAM, C.

On the 2d day of September, 1902, the National Bank of Commerce of Kansas City, Missouri, brought a suit at law against Charles M. Chamberlain on 5 promissory notes in the district court for Johnson county, Nebraska. On the 3d day of September it caused an attachment to issue in aid of its suit at law, and at the same time levied on a large amount of property alleged to have been owned by Charles M. Chamberlain, who had previously absconded and fled from the county and state. Among other prop-

erty, the attachment was levied upon an irregularly described piece of land containing about 60 acres, on which Edith R. Chamberlain, the wife, and three minor children of Charles M. Chamberlain were residing, and on which they had continuously resided for a long time before the levy of the attachment. William W. Wheatley, as treasurer of Johnson county, also had an attachment levied on all this property in aid of a judgment which he had procured against Charles M. Chamberlain and others, as sureties, on the depository bond of the Chamberlain Banking House. The two causes of action were consolidated by agreement and tried together. The treasurer of the county was defeated on the merits of his attachment, and is only here asking for relief from a portion of the costs taxed against him. The issues on costs between the county treasurer and other parties to the suit will be subsequently determined on a motion to retax costs and need not be further considered. After the levy of the attachment on the property claimed as a homestead, Edith R. Chamberlain presented an application to intervene, in which she represented to the court that the attachments were wrongfully levied upon her homestead; that she is the wife of Charles M. Chamberlain, and that she, with her three minor children, reside upon and occupy the premises as a homestead; that the husband is absent from the county and that she has a right to appear for herself and minor children; that the sheriff of Johnson county has levied upon and holds the homestead (describing it), and threatens to sell said homestead under the levy so made; that on the date of making the levy she informed the sheriff that said premises constituted her homestead, and that she subsequently served written notice on the sheriff that she claimed said property as her homestead; that the action is not based upon any debt secured by mechanics' liens, laborers' liens, or vendors' liens, nor upon any debt secured by a mortgage on the said land; that the premises are incumbered by a mortgage of \$1,000 and by the taxes for the year 1902, and that their total value, exclusive of

incumbrances, does not exceed \$2,000; that she and her husband are residents and citizens of the state of Nebraska and Johnson county; that the levy of the attachment puts her title to her homestead in question and casts a cloud thereon. The cross-petition concludes with the following prayer:

"Wherefore, intervener prays that the said levy be declared not a lien upon the said premises; that the cloud thereby cast be removed from the said premises; that the plaintiff be perpetually enjoined from asserting or claiming any lien upon the said premises by virtue of judgment, or the said order of attachment, or the levy thereunder; that William H. Cummings, sheriff of Johnson county, Nebraska, be perpetually enjoined from selling the said premises by reason of the said order of attachment or the levy thereunder; that title to said premises may be quieted in and declared intervener's homestead, and for such other and further relief as may be just and equitable."

The bank filed an answer to this cross-petition, in which it alleged, in substance, that the amount of the property claimed as a homestead was more than the head of a family is entitled to under the law, and it is worth more than \$3,000; that the indebtedness upon which the judgment sued on was obtained was incurred by fraud practiced upon the plaintiff by defendant, Charles M. Chamberlain, and that the defendant has absconded and is a fugitive from justice at this time, and neither he nor this intervener is entitled to any homestead exemption for that reason. On the issues thus joined there was a trial on the intervener's petition to the court, who found the issues all in favor of the plaintiff bank, and directed a sale of the property in controversy under the levy. From this order and judgment, Edith R. Chamberlain prosecuted her appeal to this court.

The first question urged on behalf of the plaintiff bank is that the intervening petition of Edith R. Chamberlain was treated by the court below merely as a motion to dissolve the attachment, and that, as the attachment pro-

ceeding was a purely legal action, the judgment of the court in overruling a motion to dissolve the attachment can only be reviewed upon error and not by appeal. An inspection, however, of the intervening petition shows clearly that the intervener asked only for such relief as a court of equity alone could grant. While the court might have refused to permit the intervention and required the intervener to have brought an independent action for the relief sought, yet he did otherwise, without any objection from the plaintiff bank, and when the petition was filed, the bank answered without objecting to the manner in which it was brought into court, so that the court obtained full jurisdiction both of the persons of the litigants and the subject matter of the controversy; and it makes no difference what he may have styled the proceedings in his journal entry, it was and is a suit in equity to remove the cloud from the homestead of the intervener, and as such the final order of the district court, denying the relief prayed for, is reviewable by this court on appeal.

The court found, without a scintilla of proof or any allegation in the answer of the bank to support the finding, that the mortgage on the homestead was fraudulently executed, without consideration, and for the purpose of defeating the creditors of Charles M. Chamberlain. This finding, after an examination of the record, we are compelled to set aside as unsupported either by the pleadings or proof, and as a matter not properly in issue.

The court also found, without testimony other than the admission of the intervener, that after her husband absconded she had tried to effect a sale of her homestead for \$2,000, and that she had abandoned the homestead. In view of the fact that she and her minor children were at that time, and still are, residing on the homestead, this finding flies in the face of both the homestead law of our state and the testimony contained in the bill of exceptions, and must also be set aside as wholly unsupported by the evidence.

On the question of the value of the property claimed as

a homestead, there was some difference in the opinion of the witnesses. Some placed the value at \$3,000, others at at \$3,500, and still others as high as \$4,000. But as the question of a surplus can be determined on the proceedings authorized by statute after the judgment we shall presently direct, it is not necessary now to determine what the actual value of the lands claimed is.

There are certain questions connected with homestead rights that have been so often determined by this court that they should now be the common knowledge of every member of the bar in this state. One of these is that homestead rights cannot be divested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband. The principle has been so often announced from this court that citations in its support are unnecessary. Another principle is that both an intention to abandon and an actual abandonment must concur in order to show the abandonment of the homestead, and still another is that the homestead is not a subject of fraudulent alienation. Applying these three principles to the testimony in the record, we conclude that the fact that Charles M. Chamberlain had absconded and departed from the state did not, and could not, divest his wife and minor children of the homestead which they then occupied; that, in order to show an abandonment of the homestead, it was necessary not only to prove that the intervener intended to, but actually had, abandoned it; and further, that even if intervener had sold her homestead, she had a right to do this under the law, and her act in doing so would not have been in fraud of any of the rights of creditors, either of her husband or herself.

Lastly, even if there be a surplus in this homestead, such fact would not authorize its levy and sale on execution or attachment after notice of the homestead character of the premises had been duly served upon the sheriff. But the proceeding to finally reach the surplus must be had in the manner directed in sections 5-13, chapter 36, Compiled Statutes, 1903 (Annotated Statutes, 6204-6212).

There is some complaint in the brief of plaintiff bank as to the sufficiency of the bill of exceptions, but these matters have already been settled by the court proper and need not be further considered.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the court below to enter a judgment as prayed for in plaintiff's petition for a homestead of the value of \$2,000 above liens and incumbrances in the lands described in her petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the court below to enter a judgment in favor of the intervener for a homestead of the value of \$2,000 above liens and incumbrances in the lands described in her petition, and for such other proceedings as may be required, in conformity to this opinion.

JUDGMENT ACCORDINGLY.

IDA FAULKNER, APPELLEE, v. BENJAMIN E. POWELL ET AL.,
APPELLANTS.

FILED OCTOBER 5, 1904. No. 13,622.

Evidence examined, and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Dawson county:
CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

H. D. Rhea, for appellants.

Warrington & Stewart, contra.

OLDHAM, C.

This was an action instituted in the district court for Dawson county by the appellee, as plaintiff, against appellant, as defendant, for the purpose of having a certain deed to real estate situated in said county, given by the appellee and her husband to the appellant, declared to be a mortgage and praying that the same be canceled for the reason that it had been fully paid and satisfied. There was judgment for the plaintiff below as prayed in her petition, and defendant brings the cause to this court on appeal.

To arrive at a conclusion, independent of the judgment of the trial court, we have carefully examined the testimony contained in the record, which is not at all lengthy, but four witnesses having been produced at the trial in the court below. About certain facts connected with the controversy there is no dispute. These are that the plaintiff and her husband have resided for a number of years on the land in controversy, and that, prior to the execution of the deed to defendant, the land was owned by plaintiff. It is also without dispute that plaintiff and her husband had executed a mortgage on the premises for the purpose of securing an indebtedness of plaintiff's husband to the McCormick Harvesting Machine Company for the sum of about \$450, and before the making of the deed in controversy it is also undisputed that the agent of the harvester company called upon plaintiff's husband for a settlement of this debt, and that plaintiff's husband first offered to make him a deed for the premises without foreclosure in satisfaction of the debt; that during these negotiations plaintiff and her husband were represented by one Hammond, who is since deceased, and was at the time a member of the bar and a real estate agent; that Hammond suggested that the property could be sold for \$100, and that the agent of the harvester company offered to take \$100, and satisfy the mortgage in full. Plaintiff herself was not present at this conversation. Here the testimony varies.

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Both plaintiff and her husband positively testify that Hammond agreed to advance \$100 in payment of the claim if they would execute a deed as security for that amount. It is not disputed that at this time Hammond had a number of notes and other securities of plaintiff's husband in his hands for collection, and that he acted for plaintiff's husband in the matter. Defendant Powell at this time was in the employ of Hammond, and he claims that he purchased the land absolutely for \$100, and that there was no other agreement. He says, however, that he was not present at the time the deed was executed by the plaintiff, and that he had no conversation with her about the matter. On the contrary, she and her husband testified that the defendant was present and went with Hammond down to plaintiff's house to procure her acknowledgment of the deed, and Hammond explained to her that he took the deed in the name of the defendant because he, Hammond, was a lawyer and notary public and did not want the title in his own name. It is further in evidence that to procure this money Hammond and the defendant executed a note to one of the banks at Lexington, and forwarded the money so obtained to the machine company. Hammond died before the note matured, and defendant took it up at the bank. Afterwards, defendant collected a claim of over \$500 due plaintiff's husband from an insurance company, and retained an amount equal to what he had advanced, with interest, from this fund. Plaintiff's husband testified positively that he talked with defendant about the matter, and defendant told him the exact amount due for the money advanced to the company, the taxes paid, and deeds recorded in the transaction, and that he withheld this amount from the funds in his hands by agreement, and that defendant then agreed to reconvey the property to plaintiff. Defendant denies this agreement, but admits that he retained about the amount of money testified to by plaintiff's husband, but claims that he applied this to a claim that a coal company had against plaintiff's husband. It is in evidence that plaintiff has

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lived on the land ever since the execution of the deed, and that she has never in any manner recognized defendant's claim of ownership of the premises. There is not a syllable of testimony that plaintiff ever agreed to execute the deed to the premises for any other purpose than that of securing the \$100 advanced by Hammond for the satisfaction of the McCormick mortgage. In view of this record, we reach the same conclusion as the learned trial judge, and recommend that the judgment below be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY JOHNSON V. CHARLES OWEN ET AL.

FILED OCTOBER 5, 1904. No. 13,627.

1. **Contract: PUBLIC POLICY.** Where a plaintiff claims that a certificate of deposit in the sum of \$300 was indorsed and delivered for him to a county attorney under an agreement that, in consideration thereof, he would dismiss a criminal prosecution against plaintiff and release him from jail, a court will not aid him to regain possession of the property. Such a contract or agreement is illegal, against good morals and public policy, and the court will leave the parties in the same position in which it finds them.
2. **Duress: EVIDENCE.** Under the evidence in this case, *held*, that no fraud or duress has been shown.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

Simpson & Good, for plaintiff in error.

O. C. Tarpenning and B. E. Hendricks, contra.

LETTON, C.

This action was begun in the district court for Saunders county by Charles Owen, plaintiff, against John L. Sundean, Charles H. Slama and Mary Johnson, defendants, to recover the possession of a certain certificate of deposit in the bank of Memphis, Nebraska, dated February 9, 1903, which certified that "Frank M. Owen has deposited with the bank of Memphis \$300 payable to the order of J. L. Sundean, county attorney, in current funds on the return of this certificate properly indorsed." An order of delivery was issued, and the certificate was taken by the officer and delivered to the plaintiff. The defendant Mary Johnson appeared by a guardian *ad litem*, E. E. Placek, and filed her separate answer, denying generally the allegations of the petition; and the defendants Sundean and Slama each filed separate answers disclaiming any interest in the property, and setting up specifically the facts under which each alleges the property came into his possession. At the close of the testimony for the plaintiff, the defendants moved for an instruction in their favor, which was overruled by the court and exception duly taken; whereupon they offered no evidence, and upon the motion of the plaintiff a peremptory instruction was given by the court instructing the jury to find for the plaintiff. Separate motions for new trial were filed, and, the defendants Sundean and Slama not prosecuting error, the defendant Mary Johnson joined them with the plaintiff as defendants in error and has brought the cause to this court for review.

The facts appear to be as follows: In the latter part of 1902, the plaintiff Charles Owen became acquainted with the defendant Mary Johnson and with her mother and stepfather, Mr. and Mrs. Frank Abbott. Within two months after he first became acquainted with Mary Johnson, a complaint was filed against him before a justice of the peace at Ashland, charging him with statutory rape upon the plaintiff in error, Mary Johnson. About the

time this was done, Owen absconded and went to Montgomery county, Missouri, reaching there about the 23d or 24th of December, 1902. Five or six days after his arrival he was arrested by the city marshal and placed in the county jail where he was detained about five days, and at the expiration of this time was released, no charge having been filed against him. While he was in Missouri, John L. Sundean, the county attorney of Saunders county, together with the sheriff of Saunders county, went on Sunday, January 8, to the town of Memphis in Saunders county, Nebraska, near which place Owen had lived in his father's family. Levi Owen, the father of Charles Owen, was sent for and at the office of one John Morrow a conversation was had between the county attorney and Levi Owen with reference to the settlement of the charges against the son. According to the testimony of Mr. Owen, Sr., and the sheriff, the county attorney offered to dismiss the criminal proceedings against the young man upon the charge of rape, upon the payment to him of the sum of \$300, and an agreement was arrived at between them that if \$300 were paid to the county attorney the next day the son would not be prosecuted further upon the charge of rape. Sheriff Webster, however, testifies in this connection that no final agreement was made with Levi Owen on Sunday; that he said he could not do anything until he saw Frank. It further appears that Frank Owen, a brother of the plaintiff, was at this time in Wahoo consulting an attorney with reference to the charge against Charles Owen, and that after he returned a conversation was had over the telephone between Sundean, at Wahoo, and John Morrow and Frank Owen, at Memphis. Frank testifies that Sundean talked with Morrow but that he could hear every word; that Sundean asked \$300 to settle the trouble, and that after some conversation it was agreed that he would be paid \$300 upon the condition that he would release Charles Owen at once. Frank then deposited \$300 in the bank of Memphis and obtained the certificate of deposit in controversy. He

indorsed upon the back of it, "Pay to J. L. Sundean, county attorney," and sent the certificate to Sundean the next day. He testifies that Charles Owen, before he went away, authorized him to settle any trouble he might have over Mary Johnson, and that the money belonged to Charley; Levi Owen testifying that he furnished part of the money. Some time after Sundean obtained this certificate, he indorsed it, "Pay to the order of Charles H. Slama, county judge. J. L. Sundean, Co. Atty." and left it with the county judge from whose possession it was taken under the writ of replevin. No evidence being offered on the part of the defendants, the purpose of the county attorney in this peculiar proceeding cannot be definitely known, but from numerous suggestions in the questions propounded to the witnesses upon cross-examination it would seem that the county attorney's purpose was to settle any claim which Mary Johnson might have against Charles Owen on account of his being the putative father of a child of which she was expected to be delivered. This, however, is merely inference and is contradicted by the testimony of Levi Owen, Frank Owen and J. R. Webster, the sheriff of Saunders county. Upon the testimony of the plaintiff's witnesses, then, we have it stated that the purpose of the deposit of the \$300 in the bank, and of the indorsement and delivery of the certificate of deposit to the county attorney, was to procure the dismissal of a criminal charge against the plaintiff in this case and his release from jail, and further that before the plaintiff left for Missouri he had authorized his brother Frank to procure a settlement of any proceedings which might be brought against him.

It was attempted to bring the plaintiff within the principles of law applicable to cases where a person has been compelled to pay money or deliver up valuable property by means of duress, but the evidence shows that no money was deposited in the bank, nor was the certificate sent to the county attorney until after Frank Owen, the man who deposited the money and to whom the certificate of

deposit was originally delivered, had consulted an attorney with reference to his brother's case; and further, the conversation over the telephone wherein the negotiation was had between the county attorney, at Wahoo, and Frank Owen, at Memphis, fails to show the existence of any fear or compulsion acting upon the mind of Frank other than the fear of the consequence of a criminal prosecution. We have here, then, a plain case—accepting the plaintiff's version of the transaction as true—of money being paid to a public officer for the purpose of inducing him to dismiss a criminal charge and procuring the release of a prisoner, since the delivery of the certificate, properly indorsed, amounted to a transfer to Sundean of the fund deposited. Where a party has, in carrying out an illegal agreement, placed himself in a certain position, the courts will not lend their assistance to him to retrace his steps. If he has parted with any property or money in furtherance of his unlawful object, the court will leave him where it found him, and will not lend him its assistance against his fellow wrongdoer. It is unnecessary to cite authorities to the proposition that such an agreement as is testified to is manifestly against good morals and public policy, and that no court will aid a party to it, either to carry out its provisions, or to rescind it and recover property parted with in the execution of the same. The defendant in error argues that he had not committed a crime; that he did not authorize any person to pay the county attorney any sum of money; and that since the county attorney obtained the certificate by duress he can maintain this action; but if he did not authorize Frank Owen to deposit this money and to deliver the certificate of deposit to the county attorney, the transaction was not his act and he could not be injured by the unauthorized act of Frank. The evidence, however, is uncontradicted that he authorized Frank to settle the matter for him, and further, since he claims the certificate of deposit as his own, he has adopted and ratified his brother's action in its entirety. He cannot blow hot and cold at the same time. We conclude there-

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fore that the action taken by his brother binds the defendant in error as fully as though it had been taken by himself.

The agreement between Frank and the county attorney was fully executed, so far as the plaintiff was concerned, by the delivery of the certificate properly indorsed. The contract is not executory, but fully executed on the plaintiff's part; hence the authorities as to executory contracts do not apply.

Under the facts in this case, the plaintiff is entitled to no relief in this action, and the judgment should be reversed and the cause remanded to the district court for further proceedings in accordance with this opinion.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, v. RICHARDSON COUNTY ET AL., APPELLANTS.

FILED OCTOBER 5, 1904. No. 13,045.

1. Case Followed. *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, followed.
2. Act Constitutional. Sections 39 and 40, article I, chapter 77, Compiled Statutes, 1901, are constitutional and valid.

APPEAL from the district court for Richardson county:
JOHN S. STULL, JUDGE. *Affirmed.*

Smyth & Smith and John Gagnon, for appellants.

Charles F. Manderson, J. W. Dewcese, Francis Martin and Frank E. Bishop, contra.

H. H. Baldrige, C. C. Wright, J. P. Breen and W. H. Herdman, amici curiæ.

POUND, C.

The facts in this case are the same as those involved in *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, except that assessments for different years are in question. A further point is made on behalf of the county, however, not raised in the former case, namely, that sections 39 and 40, article I, chapter 77, Compiled Statutes, 1901, are unconstitutional. This point has been argued with no little ability and ingenuity, on the part of appellants, and is of such importance as to require our careful consideration.

Four objections are made to the plan for assessment of railroad properties prescribed by said sections. The first is that "sections 39 and 40, in legal effect, exempt the franchises of the railroad corporations from taxation and thereby violate section 1, article 9 of the constitution." This contention is disposed of sufficiently, in our opinion, by *State v. Savage*, 65 Neb. 714, in which this court held, construing the sections in question, that "the state board of equalization, in the assessment of railroad and telegraph properties, should include in its assessment the value of the franchise with the tangible property assessed." HOLCOMB, J., delivering the opinion of the court, at page 750, says:

"It seems reasonably clear that in assessing railroad and telegraph property as contemplated by sections 39 and 40, the whole property belonging to any one corporation, and subject to assessment in this state, should be valued for tax purposes in its entirety, and that in such valuation should be included all elements going to make up the entire property, whether consisting of franchises or other intangible property, or physical property, be it real, personal or mixed."

Next, it is asserted, to quote from the brief of counsel, that "the statute, sections 39 and 40 of the revenue law, for the assessment of railroad property provides a different mode of assessment for that property from that which

is provided for the property of the citizen, and is, therefore, void, as violating the uniformity required by the constitution." Section 1, article 9 of the constitution, reads, in part: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." Construing this section, the court said in *State v. Savage, supra*:

"The paramount object of the constitution, and the laws relative to taxation, as we conceive the rule to be, is to raise all needful revenues by valuation of the taxable property so that each owner of property taxed will contribute his or its just proportion of the public revenues."

If properties are so essentially distinct in their nature that to assess each in one particular way would not result in requiring the respective owners to pay taxes in proportion to the value of their respective properties, it is evident that an attempt to provide a uniform method of assessment would involve contravention of the "paramount object" of the constitution. Hence, it is the result, not the method employed in reaching it, which must be considered. Counsel point out that section 52 of said chapter directs the assessor, when valuing real property generally, to fix "the value of each tract or lot improved, the value of each tract or lot not improved, and the total value," while the state board of equalization, in valuing a railroad, is directed, as counsel put it, to "lump the whole thing, whether it be buildings, lots, tracts of land or personal property, and put a price upon the heap." But the two species of property are in no wise comparable. What sort of result should we get if a local assessor, assessing 10 miles of road, was required to value the right of way unimproved, the right of way with ties and rails laid upon it, and the total value? What gives the 10 miles of track their real value is the franchise of the corporation operating them, the connections in and out of the state, and the

fact that they are part of a great system of railway, operated as a whole. An attempt to assess the track of a railway in any one county by the statutory method of assessing houses and lots, would produce gross inequality, and enable the most valuable features of railroad properties to escape taxation. It is said that the scheme of dividing the total value by the number of miles in any county is arbitrary. But the real question is whether it provides a reasonable mode of ascertaining the value of that portion of a railroad lying in a given country, so as to insure that the corporation contribute its just proportion of the public revenues. The track in any one county is not an entity. It is merely part of a whole, spreading over many counties, or even many states. The value of each such part is obviously the proportion which it bears to the whole. Viewed by itself, apart from its place in the whole, it is merely a ditch and grade, bearing ties and old iron.

The third objection is that the system provided by the sections in question "exempts railroad property assessed by the state board of equalization from the payment of its proportion of the taxes levied for the support of the county, school district and city, appellants in this action, and thereby violates the rule of uniformity prescribed by section 1, article 9 of the constitution." As the municipality in question is not a city of the metropolitan class nor of the first class, in which different standards of assessment prevail from those employed in the state at large, this case does not involve the question expressly left open by the opinion of HOLCOMB, J., in *State v. Savage, supra*. Here the same assessment serves for county and municipal purposes alike as to all property. Of course the presumption is that both the board of equalization and the local assessors act fairly and impartially, and fix a just and true valuation. *State v. Savage, supra*. Hence the question is whether, assuming that they do so, a proper proportion of the burdens of municipal taxation is thrown upon the railroad companies. This question depends upon

the view taken as to the nature of railroad property. If the railroad is an entity, we have one piece of property, spreading over several counties; if that portion within each county is a separate entity, then a valuation of such separate entity should be made in each county, as in other cases. We do not think this matter admits of debate. Bridges, depots, water tanks, roundhouses, and other necessary structures upon the right of way, are as much parts of the railroad as a whole as a permanent building upon land is annexed to and a part of the land. They have no separate existence apart from the road, but go to make up the one entity called the railroad. So thoroughly is this true, that they will pass by mortgage or conveyance of the road without being named expressly. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 L. ed. 1210; *United States Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. 480. If, as held in the latter case, a hotel on the right of way of a railroad, operated in connection therewith for the accommodation of its patrons, is a mere appurtenance to the road, covered by conveyance of the road, without express mention, how much more is this true of bridge depots and the like? But if these are not separate entities, to be dealt with apart from the road as such, it follows that the municipality cannot claim to have within its borders certain specific railroad property, but only a certain proportion of the whole road. This is the view taken by the statute, and we think it well-founded and reasonable. Apart from the road as a whole, the bridge is only so much junk; severed from the road, the depot is of little or no value. Each is made specially to be a part of the whole line, and to treat it as a separate entity is to take away its chief value. If the road as a whole is valued correctly, the several portions in each county cannot fail to be justly valued when assessed at the proportion they bear to the whole. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 220, and cases cited.

Finally, it is said that the statute makes a classification not authorized by the constitution. In our view the classi-

fication is made, not by the statute, but by the nature of the subjects dealt with. They are intrinsically and fundamentally distinct, and the legislature, which is given the power expressly to fix the mode of assessment as it may direct, has adopted a method which has been in operation many years, has been readopted in the new revenue law, and is reasonably calculated to meet the problem in hand. Any method would doubtless be open to some objection in its practical workings. But if the method chosen may be carried out so as to produce uniformity of taxation in proportion to the value of property, as contemplated by the constitution, it is constitutional and valid.

Two further objections to the statute have been urged by counsel who appear as friends of the court. The first is that it operates unequally and unreasonably with respect to railroad companies whose tracts are situated wholly within one county, such, for example, as terminal and belt line companies. The arguments advanced on this ground, however, apply rather to the constitutionality of provisions in the several statutes governing municipalities, whereby the valuation of railroad properties for state and county purposes is required to be taken as a basis of assessment in such municipalities made on a different basis, than to the constitutionality of the general statutory provisions with reference to state and county assessments. So far as they apply to the sections here in question, we think they are met sufficiently by what has been said already. The other objection is that the statute contravenes the constitutional guaranties that no person shall be deprived of property without due process of law, in that it does not provide for notice to the companies assessed of the meeting of the state board of equalization, and does not provide for notice to other taxpayers of the meeting of such board, in order that they may insist upon proper equalization of their assessments with those of the companies in question. The statute provides a date upon which railroad companies within the purview of the act shall make returns. It provides a place where the meeting

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of the state board of equalization shall be held, and provides expressly that such meetings shall take place as soon as practicable after the returns are filed. These provisions must be construed, if possible, in such manner as to make them constitutional and valid. If the statute had said that the meeting should be held immediately upon the return required to be made by the railroad companies, there could be no question that the time and place were stated with sufficient certainty. But it is well settled that "immediately" means "as soon as practicable," and conversely it is proper to construe "as soon as practicable" to mean "immediately." *Huff v. Babbott*, 14 Neb. 150; *Lydick v. Korner*, 13 Neb. 10. So long as the time and place of the meeting of the state board of equalization are thus fixed with such certainty as to enable the companies to know by reference to the statute at what time and at what place their properties will be assessed and valued, we perceive no merit in the objection. The state board of equalization is a public board. Its meetings are public, and as a matter of fact and practice the corporations have always been accorded a hearing before it. Where the statute names the time and place for the meeting of the assessing board, personal notice is not necessary. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *State Railroad Tax Cases*, 92 U. S. 575, 610; *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421. If returns are made as required by the statute, all citizens are advised by the terms of the statute as to the time and place of the meeting of the state board of equalization. If any company fails to make a return, five days are provided for during which the delinquent return may be received. At the expiration of such five days, the auditor, a public officer, is required to obtain the necessary information, and a meeting of the state board of equalization is to be held "as soon as practicable," or in other words, immediately. These provisions of the statute would seem to afford other taxpayers a sufficient opportunity to be heard with reference to the assessment of the companies in question for the

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purpose of insuring uniformity and equality in taxation. The practice has always been in accordance with this interpretation of the statute, and we think the sections in question will reasonably bear such construction.

We therefore recommend that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. CASS COUNTY ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,292.

1. **Res Judicata.** "A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action." *State v. Broatch*, 68 Neb. 687.
2. **Taxes: CAUSE OF ACTION.** A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property under an assessment for a prior year.
3. ———: **RES JUDICATA.** If the liability of property to taxation depends upon the existence of a specific fact, and that fact is necessarily determined in one litigation, it cannot be controverted by the same parties in a subsequent litigation.
4. ———: ———. The west half of the railroad bridge over the Missouri river owned by the company which operates through passenger and freight trains continuously through different counties of this state to and over said bridge, and thence through adjoining states, is "a part of the continuous line of road" within the meaning of sections 39 and 40 of the revenue act in force in 1901 (Compiled Statutes, ch. 77), and is assessable for taxation by the state board and not by local assessors, and a prior adjudication that such bridge so used is not "a part of the continuous line of road" is not an adjudication of fact, and will not operate as an estoppel against the parties to such prior litigation.

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5. **Question of Law.** The question whether such bridge so owned and used is "a part of the continuous line of road," within the meaning of said statute, is a question of law, and not a question of fact upon which an estoppel can be predicated.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

Jesse L. Root, for appellants.

J. W. Deucece, Byron Clark and F. E. Bishop, contra.

C. C. Wright and W. H. Herdman, amici curiæ.

SEDGWICK, J.

The principal questions involved in this case are identical with those stated and discussed in *Chicago, B. & Q. R. Co. v. Richardson County*, ante, p. 482, which follows and approves *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, and also in *State v. Back*, ante, p. 402.

There is another question presented in this case which has been thoroughly discussed in the briefs and in the oral argument upon the rehearing. The bridge in question in this case was assessed by the local officers for taxation for the years 1881 to 1885, inclusive, and in the year 1886 the railroad company, having paid those taxes under protest, brought an action in the district court for Cass county to recover the amounts so paid. Afterwards that action was brought to this court, and was determined against the company. *Cass County v. Chicago, B. & Q. R. Co.*, 25 Neb. 348. It is contended that by the judgment in that case the questions involved in the case at bar are *res judicata*. The local authorities assessed this bridge for taxation for the year 1901, and the company brought this action to restrain the collection of the taxes. The district court enjoined the collection of the taxes as prayed, and the case was brought to this court by appeal. The subject matter of the former litigation was the taxes

assessed against this property for the respective years therein named, and the subject matter here is the taxes assessed for the year 1901, so that it cannot be said that the two cases involved the same subject matter, and, strictly speaking, the judgment in the one case could not have been *res judicata* of the subject matter involved in the other. *State v. Savage*, 64 Neb. 684, 703; *State v. Broatch*, 68 Neb. 687.

The real question in dispute between the parties is whether in the former action the rights of the parties and questions of fact, then in dispute between them, have, by that case, been adjudicated so as to estop the parties to that litigation from now questioning the facts so determined. It was said by this court in *State v. Broatch*, 68 Neb. 687:

"A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action."

Of course, the propositions of law that were advanced by the court as requiring the disposition made of the issues in the former case, if afterwards found to be erroneous, would not be binding upon the court in subsequent litigation between the parties involving a different cause of action. *State v. Savage, supra*; *State v. Broatch, supra*.

Many authorities are cited and ably discussed in the respective briefs of counsel. Our labors have been much lightened by those discussions and by the oral arguments at the bar. There is substantially no difference of opinion upon the controlling legal principle involved. Specific facts that are so involved in a litigation that the result of

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the litigation depends upon the determination of these facts are necessarily settled by that litigation, and the authorities substantially agree that such facts so determined cannot afterwards be controverted by the parties to the former litigation. To determine, then, the question before us, it is necessary to ascertain what facts controlling the rights of the parties in the former case were adjudicated, and how far those facts so ascertained are involved in and necessarily control the decision in this case. The petition in that action alleged that the plaintiff "owns the line of railroad extending from Pacific Junction, in Mills county, Iowa, westwardly across the Missouri river, and through the counties of Cass, Lancaster and other counties farther west in the state of Nebraska; and that it has owned and operated said line of railroad since the 1st day of January, 1880; and that said line of road and property thus owned by the plaintiff is situated in more than one county in the state of Nebraska." The answer alleged "that the said railroad bridge, which spans the Missouri river at Plattsmouth, Nebraska, is a separate and independent structure from the 'roadbed and right of way' of said railroad company," and further alleged "that said railroad bridge has never been operated and controlled by said plaintiff, either in the states of Iowa or Nebraska, as a continuous part of its roadbed and main track; on the contrary, defendant avers and charges that said bridge has been maintained and operated by said corporation plaintiffs always since its construction as a separate and independent structure from its main line."

In the brief for the county in the case at bar it is said: "The real controversy between the railway company and the county of Cass is the right of the local officers to assess and tax the west half of the bridge across the Missouri river near Plattsmouth, in said county," and again, "We now ask this court to say whether in the district court in said cause the issue of fact as well as of law was not raised, litigated and determined."

It is insisted that after the former case had been brought

to this court, and the judgment of the lower court therein reversed and the cause remanded, the case was dismissed and no final judgment entered in the lower court, and that therefore the issues therein presented were not finally adjudicated. If our attention had been called to a showing in this record that the plaintiffs had been allowed by the court to dismiss their former proceedings without prejudice to a future action, we would feel it incumbent upon us to discuss the effect of such dismissal. As it is, we think the question before us is fairly stated by counsel for the county in the foregoing quotation from the brief. It was said in the opinion of the court in the former case that it was alleged in the petition that the taxes "were unlawfully levied and collected, for the reason that the bridge was, at all times, a part of the line of railroad of defendant in error, and legally taxable only as the other portions of the road were taxable; and that the same was for each year reported to the state board of equalization as a part of the railroad, and taxed accordingly, all of which taxes had been paid," and that the answer consisted mainly of specific denials of the allegations of the petition, and "alleged that the bridge was not legally taxable by the state board of equalization; that it was not a part of the roadbed of defendant in error's road; that it was not operated as a part of said road; that it was listed to the precinct assessor for taxation by the duly authorized officers of the railroad company, and that it was legally subject to taxation by the county." The language might indicate that the writer of the opinion considered that the general question whether the bridge was "a part of the line of said road" was the ultimate fact to be determined, and was a simple question of fact upon which the decision in controversy depended; but in construing this language of the learned author of that opinion, it must be borne in mind that he was not discussing a question of *res judicata*. It was not necessary for him to discuss the question whether the result of the litigation depended upon the determination of disputed questions of fact, or depended

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upon the application of legal principles to conceded facts.

Although a claim for taxes under the assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of that charter right in one litigation will estop the parties thereto to question that exemption in subsequent litigation. This was distinctly held in *New Orleans v. Citizens Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905. This is a case much relied upon by the appellant in the case at bar. The thing in litigation upon which the right to collect the tax in that case depended was the contractual exemption of the bank under its charter, and, it having been determined in the prior litigation that such contractual relations existed, it was held that the parties were estopped to deny it in subsequent litigation. The adjudication of a contract right is an adjudication of fact, and a judgment that necessarily involves the question of the existence of a charter or contract right will be binding upon the same parties in future litigation involving the existence of that right. The existence of such contract right was held to be the thing adjudicated in the former litigation. The court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies." Some of the leading cases are then reviewed to illustrate this rule and the court said further: "*In Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, and *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes."

When the court construes a contract and determines the fact that the contract exists with the construction given it, and the rights of the parties are made to depend upon the existence of such contract, the parties are estopped in future litigation to deny its existence.

In *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, it is made plain that the court was construing the statute and merely applying its provisions to conceded facts. The court said:

"It is conceded by defendants that the bridge over the Missouri river at Rulo, on the west half of which the taxes in dispute were levied, is owned and used by plaintiff as a part of its continuous line of track," and after quoting at large sections 39 and 40 of the statute, it was further said: "It needs no argument to show that the railroad bridge at Rulo is neither a machine shop, a general office building or a storehouse; and if this bridge, within the meaning of the statute, is neither real nor personal property outside the right of way of plaintiff, it is not to be assessed by the local assessor, but is taxable only by the state board of equalization. There is no claim that it is exempt from taxation, the only controversy being as to the jurisdiction of the taxing powers. If it is inside, i. e., a part of, the right of way, as the term is employed in the act, then it must be assessed by the state board, otherwise not. The meaning of the term 'right of way,' as employed by the statute, is important, indeed, decisive of the question."

This fact is made the basis of the decision. Manifestly all other matters discussed in the opinion are legal questions and relate to the construction of sections 39 and 40 of the revenue law (Compiled Statutes, 1901, ch. 77). Clearly this does not make the determination of the question depend upon any disputed fact. It is held that the fact which is here recited, "if the bridge is inside the right of way as the term is employed in the act," then it must be assessed by the state board. It is in that case, and in the two later cases above referred to, determined as matter

of law that the proper construction of the sections of the statute under consideration is that a bridge which is used by a railroad company as a part of its continuous line of track is assessable by the state board and not by local assessors. The determination of these cases was made to depend upon the existence of this fact alone. It is manifest that this fact was not contested in the prior litigation relied upon as an estoppel in this case. The pleadings in that case will not admit of the construction that an issue was tendered as to whether the property of the railroad company was situated in more than one county, or as to whether the railroad company owned the bridge in question, or as to whether it used the bridge as a part of its continuous line of track, or as to whether the bridge was inside the right of way within the meaning of the statute as it is now construed. The question contested was whether these facts brought the case within the provision of section 39, and it was erroneously determined that they did not. The court, in determining whether the conceded ultimate facts constituted the bridge in question a part of the continuous line of road within the meaning of the statute, said that it was shown that much higher rates were charged for the transportation of passengers and freight across the bridge than over any portion of defendant's road, and that while, in fact, so far as the running of trains and transportation of passengers was concerned, no change or transfer was made, yet additional burden was placed upon all for crossing the bridge. It was said: "To that extent, at least, the road was not operated as a continuous line." Other facts are mentioned in the opinion as tending to show that the road was not operated as a continuous line. Upon consideration of all these facts, none of which were in dispute, it was concluded that the road was not operated as a continuous line within the meaning of the law. This construction of the law has been found to be erroneous, and it is by the later decisions declared to be the law of this state that the facts which have always been conceded to exist

constitute the bridge a part of the continuous line of road within the meaning of the statute. The facts, then, to which the construction of the statute is applied are not in controversy in this case, and have never been controverted, but always conceded or assumed in all the similar litigation. It follows that neither party is estopped to assert these essential facts. The other questions presented by the record are sufficiently discussed in the opinions above referred to.

The judgment of the district court is

AFFIRMED.

**STATE OF NEBRASKA, EX REL. FRANK N. PROUT, ATTORNEY
GENERAL, V. NORTHWESTERN TRUST COMPANY.**

FILED OCTOBER 20, 1904. No. 13,606.

1. **Instalment Investment Company.** If the organization of a corporation and its plan of doing business involve receiving from each of its members a stated sum at stated intervals until a specified amount is received from such members, and investing this money in property for the benefit of its members, it is an instalment investment company within the meaning of chapter 29, laws of 1903. Compiled Statutes, chapter 16, sections 216-227.
2. **Power of Legislature.** It is competent for the legislature to provide for publicity of the condition and business methods of such corporations, and to make reasonable classification of corporations, companies and individuals for that purpose.
3. **Constitutional Law.** The statute in question is not in violation of article III, or of section 1 of article VI, of the constitution, nor does it give the state banking board such arbitrary powers as to be unconstitutional for that reason.

ORIGINAL action in the nature of quo warranto to oust respondent of its franchise. Heard on demurrer to answer of respondent. *Demurrer sustained. Judgment of ouster.*

Frank N. Prout, Attorney General, and Norris Brown, for relator.

A. L. Knabe, contra.

SEDGWICK, J.

This is an original action in this court to oust the defendant corporation of its franchise and annul its powers and privileges. As ground for these proceedings, it is urged by the attorney general that the defendant is an instalment investment company, and has not procured from the state banking board a certificate of approval as the statute requires. The question is presented upon a general demurrer to the answer of the defendant. In the answer it is confessed that no application has been made to the state banking board for its certificate of approval. It is insisted by the defendant that the defendant is not an instalment investment company within the meaning of the statute, and that the statute in question is unconstitutional and void.

1. The defendant shows the plan and scope of its organization and business in its answer. A copy of its contracts with its members is attached thereto. By this plan the defendant collects from its members \$5 a month, and obligates each member to pay \$5 a month for 30 months, and thereafter \$15.70 a month until \$1,000 are paid. This money is to be invested in homes for the benefit of the members. The statute in question is entitled "An act to provide for the government, regulation, examination, reporting and winding up of the business of certain corporations, associations, companies, copartnerships and individuals engaged in the business of raising money from members or others, by means of stated instalments or payments, to be held, invested or disbursed in accordance with certain plans or schemes; to designate such corporations, associations, companies, copartnerships or individuals as instalment investment companies." The first section of the act provides: "Every association * * * which is or shall be organized for the purpose of raising money from its members or others, by means of stated instalments or payments, to be held, invested or disbursed by said association, whether the money so contributed is

paid in for shares in such association, or is held by the association for investment and accumulation for the benefit of the contributors, or as an advance on merchandise, or property of any kind, to be delivered in the future, or is held by the association to be disbursed among the contributors, or any of them, in accordance with any agreed plan or scheme, and whether the relation of the contributor to the association be that of a member, shareholder, vendee, creditor or beneficiary of a trust; * * * shall be known for the purposes of this act, as an instalment investment company." Laws of 1903, chapter 29; Compiled Statutes, chapter 16, sections 216-227 (Annotated Statutes, 6649-6660).

There can, of course, be no question that the defendant company is within the purpose of the act as disclosed in the title, and within the language of the act itself as shown in the foregoing quotation. The defendant suggests that the money contributed by the members "never in any event becomes the property of the defendant," and seems to urge that because of this fact it is not an instalment investment company. Of course, this fact is made immaterial by the express language of the statute. If the corporation is "organized for the purpose of raising money from its members by means of stated instalments or payments," and the money so raised is either held, invested, or disbursed by the corporation for the benefit of the contributors, or among the contributors or any of them, "in accordance with any agreed plan or scheme," the company "shall be known for the purpose of this act as an instalment investment company."

2. The statute exempts building and loan associations, savings banks, insurance companies, and fraternal beneficiary associations from its provisions. This is said by the defendant to render the statute repugnant to the 14th amendment of the constitution of the United States. The reason for this conclusion seems to be that the companies and associations so exempted "may engage in an instalment investment business without requiring them to ob-

tain the permission of the banking board, or subject them to penalties imposed by the statute." It is urged that the business of these companies by its very nature is within the spirit of the statute, and that as such companies are generally organized and conduct their business, they would ordinarily come within the letter of the statute also. There might be some reason to question the policy of the statute if these exempted companies and associations were relieved from supervision by the state. The legislature has provided by other statutes for their regulation and supervision, which is the manifest reason for exempting them from the provisions of this statute. The classification attempted by the legislature is not unreasonable and arbitrary, and no sufficient objection is urged to the power of the legislature to make such classification. It cannot therefore be said that any discrimination in that respect has been made against instalment investment companies as they are defined in this statute.

3. Again, it is urged that the statute in question is in violation of article III, and section 1 of article VI, of the constitution of this state. This thought is derived from the supposition that by this statute the state banking board is given judicial powers. The statute does not confer judicial powers on the state banking board. *Crawford Co. v. Hathaway*, 67 Neb. 325.

It is also objected that the 9th section of the act gives the state banking board arbitrary power to revoke the certificate of approval, and that the "action of the board so taken shall be sufficient authority for the appointment of a receiver," but this is not the meaning of the section in question. The provision is that, if it appear that grounds therefor exist, the board shall revoke the certificate; that is, if the grounds provided by statute for such revocation exist, and the facts are made to appear to the board, they shall revoke the certificate; and the further provision is that the attorney general shall apply to the proper court for the appointment of a receiver, and, if such fact or facts be made to appear (that is, to

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the court), it shall be sufficient to authorize the appointment of a receiver, etc. The objections urged to the statute might be urged generally to other similar statutes to regulate building and loan associations and fraternal insurance associations and others. These objections are not very extensively argued or strenuously insisted upon in the brief, and we cannot see that the statute should be held unconstitutional for any of the reasons presented by the defendant. It follows that the defendant, not having complied with these provisions, is transacting its business unlawfully. It is urged by the attorney general that the scheme of the defendant is such as to bring it within the prohibition of our statute against lotteries; and that the defendant's business is unlawful because it involves the entering into contracts which cannot be performed on the part of the defendant. It does not appear to be necessary to examine and discuss those questions in advance of the action of the state banking board.

The demurrer to the answer is sustained, and judgment of ouster will be entered as prayed.

JUDGMENT OF OUSTER.

JOHN BLAIR V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1904. No. 13,611.

1. **Information: ELECTION.** When an information contains two or more counts charging distinct and separate offenses of the same nature, the trial court may, in the exercise of a sound discretion, require the county attorney to elect on which count he will rely for a conviction, either before the commencement of the trial, or after the state has produced its evidence in chief, and before the accused is required to make his defense.
2. **Motion to Quash.** Record examined, and *held* that the defendant's motion to quash the second and third counts of the information was properly overruled.

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3. **Demurrer to Evidence.** Evidence contained in the bill of exceptions examined, and found sufficient to resist the demurrer of the defendant thereto, and his motion to require the court to direct the jury to return a verdict in his favor.
4. **Bulings.** *Held*, that the record discloses no reversible error in receiving and rejecting evidence.
5. **Evidence is relevant** which shows that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution; and such conduct on the part of an accused person is an incriminating circumstance to be weighed by the jury in determining the question of his guilt.
6. **Statutory Rape: EVIDENCE.** In a prosecution for statutory rape, frequent acts of improper familiarity between the parties implicated may be received in evidence to prove their adulterous disposition toward each other.
7. **Leading Questions.** The trial court may, to a reasonable extent, permit leading questions to be propounded, on direct examination, to a hostile or reluctant witness.
8. **Continuance.** Record examined, and *held* that defendant's application for a continuance, after the prosecutrix had changed her evidence, was properly denied.
9. **Reopening Case.** It is within the sound discretion of the trial court to permit a party, in furtherance of justice, to reopen his case and introduce other and further evidence at any time before the close of the trial; and where it is made to appear that there has been no abuse of discretion, and the substantial rights of the opposite party have been in no manner prejudiced by such a course, error cannot be predicated thereon.
10. **Assistant Counsel.** An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose.
11. ———. *Held*, that a general objection to the appearance of such counsel made during the trial in connection with the examination of a witness, and without any showing to support it, was properly overruled.
12. **Instruction.** The fact that a single clause of an instruction is incomplete is not sufficient ground for a reversal, if, when the whole

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paragraph is read and construed together, its meaning is clear and certain, and it appears from the record that the jury could not have been misled thereby.

13. Evidence reviewed, and *held* sufficient to sustain the verdict.

ERROR to the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

George B. France, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and Meeker & Wray, contra.

BARNES, J.

The state prosecuted John Blair in the district court for York county on a charge of statutory rape. The trial resulted in a conviction, and the court sentenced him to be confined in the state penitentiary for a period of three years. From such conviction and judgment the defendant brings error. The information contained three counts, in each of which the state attempted to charge the accused with the crime of statutory rape, committed on the person of one Beulah Thomas, who was alleged to be a female child under 18 years of age. In the first count the date of the alleged sexual intercourse was stated to be June 1, 1901; in the second count the time alleged was January 4, 1903, and in the third count the date named was February 5, 1903. Before going to trial the defendant filed a motion to require the state to elect on which count it would prosecute. The court, at that time, reserved his decision, but when the state had introduced its evidence in chief the motion was sustained, and the county attorney elected to rely for a conviction on the third count of the information.

Counsel for the defendant contended that the failure of the court to require an election before the trial commenced was reversible error. In some jurisdictions it is held that, where the indictment or information charges two or more distinct and separate felonies, the prosecutor

should be required to elect on which count or charge he will rely for a conviction, before going to trial. But most of the courts hold that a number of separate and distinct felonies, all of which may be tried in the same manner, which are of the same general character, which require for their proof evidence of the same kind, and the punishment for which is of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial on all of such counts at the same time; that the matter of requiring an election in such cases is left to the sound discretion of the trial court, to be exercised when the state has submitted its evidence in chief, and before the accused is put on his defense. This rule is sustained by the great weight of authority in this country. Maxwell, *Criminal Procedure* (2d ed.), 550, 551; Wharton, *Criminal Pleading and Practice* (9th ed.), secs. 295, 296; *Korth v. State*, 46 Neb. 631; *State v. Hodges*, 45 Kan. 389, 26 Pac. 676; *Roberts v. People*, 11 Colo. 213, 17 Pac. 637; *State v. Crimmins*, 31 Kan. 376; *State v. Schweiter*, 27 Kan. 499; *Commonwealth v. Jacobs*, 152 Mass. 276, 25 N. E. 463; *State v. King*, 114 Ia. 484, 91 N. W. 768; *Bailey v. State*, 4 Ohio St. 440.

We are firmly committed to the rule last above stated, and so it only remains for us to determine whether the court was guilty of an abuse of discretion in not requiring the prosecutor to elect on which count he would rely until after he had produced his evidence in chief. The record discloses that, although it was charged in the first count that the act of sexual intercourse took place on the 1st day of June, 1901, and in the second count that the offense therein described was committed on the 4th day of January, 1903, the state introduced no evidence establishing, or tending to establish, either of these counts. In fact, the record clearly shows that no attempt was made to prove the commission of any offense other than the one on which the state elected to rely for a conviction. This being the case, the fact that the state was not required

to elect, until after it had introduced its evidence in chief, resulted in no prejudice to any of the defendant's substantial rights. It therefore follows that the court was guilty of no abuse of discretion.

The defendant insists that the court erred in refusing to quash the second and third counts of the information; and also in overruling his motion to quash the third count after the state had introduced its evidence and rested. And it is contended that the state having charged in the first count that the offense described therein was committed on the 1st day of June, 1901, the second and third counts, in which the dates of the offenses charged were alleged as of January 4, and February 5, 1903, failed to state any offense, because, if the charge contained in the first count were true, the prosecutrix could not have been chaste at the times last above mentioned. In the first place, an examination of the first count shows that the facts alleged therein were not sufficient to constitute the crime of statutory rape. Therefore, it stated no offense, and, even if that count had stated an offense, it appears that the state had no proof, or at least offered none, to sustain it. For these reasons the allegations of the first count could in no way affect the charges contained in the other two. Again, when the state elected to rely on the third count for a conviction, the second count was as completely eliminated from the case as though it had never been set forth in the information. It follows that when the accused was required to present his defense the information, in legal effect, contained only the third count, and stood precisely as though it had never contained any other. That count was sufficient in form and substance to charge the offense of statutory rape, and on that count, and no other, the jury returned a verdict of guilty. Again, it was held in *Bailey v. State*, 57 Neb. 706, that the defendant cannot plead his own defilement of the girl within the statute of limitations as a defense to a later defilement. The court said:

"Had the first defilement of the girl by the prisoner

occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations and each intercourse a part of the crime charged in the indictment."

For these reasons it is apparent that the court did not err in overruling the defendant's motion to quash.

It is further contended that the court erred in overruling defendant's demurrer to the state's evidence. It is true that when the state first rested, the prosecutrix had, by her evidence, denied that the defendant had sexual intercourse with her at any time. But taking into consideration the testimony of her mother, in which she related the fact of having caught the defendant and her daughter in a compromising position in the barn on the 5th day of February, 1903, with other circumstances detailed by the witnesses, the conduct of the prosecutrix and the defendant toward each other, the fact of his having her taken from her own home in the night time, conveyed her to a neighbor's, taking her thence to his own house where he kept her concealed for more than a week, at a time when he knew she was wanted by the state as a witness against him in the prosecution of this case, together with her confessions to her mother, and others, as shown by the record, we cannot say that a conviction could not have been sustained, and that the case should not have been submitted to the jury. We think, however, this objection is eliminated because the case was reopened and other and further evidence introduced by the state.

Under the general head of errors of law occurring at the trial, many assignments are discussed by the defendant's counsel, and we will endeavor to dispose of them in the order in which they are presented.

Complaint is made because the prosecution was allowed to ask Miss Thomas certain questions relating to her evidence given at the preliminary hearing. For example: "Q. Do you remember the circumstances you testified to

on the preliminary examination as to what took place upstairs on that Sunday in June, 1901, between you and Blair?" The answer to this question, as shown by the record, was: "I do not remember. No, sir." It appears that all like questions were answered by her in the same way. It is apparent that the witness was at least a reluctant one, and for that reason the form of the questions was permissible. It further appears that no attempt was made to show what her evidence, or any part of it, was on the preliminary hearing, and, as the questions contained no recital of such evidence, it is not apparent to us how the examination complained of could in any way prejudice the defendant's rights.

Complaint is made of the admission of certain parts of the evidence describing defendant's conduct in removing the prosecutrix from her home in the night time and concealing her at his house, when he knew she was wanted as a witness by the prosecution. It is contended that this evidence could have no tendency to prove the crime alleged to have been committed on the 5th day of February, 1903, and only had a tendency to prejudice the rights of the defendant. We think counsel have failed to comprehend the purpose for which this evidence was introduced. It is true that it constituted no direct proof of the specific act charged against the defendant, but evidence of such conduct is always admissible because it is inconsistent with the innocence of the accused. "Evidence is relevant to show that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely." 12 Cyc. 398.

In *State v. Keith*, 47 Minn. 559, 50 N. W. 691, it was said:

"It is a prejudicial circumstance, which may weigh heavily against one accused of crime, that witnesses were by him sent out of the state and kept away, so that their testimony might not be produced against him."

We therefore hold that all of the testimony connecting

the defendant in any way with removing the prosecutrix from her home and concealing her whereabouts from the prosecution was relevant, and therefore properly received. The fact that this was done with the consent, and at the request, of the prosecutrix does not rob it of its incriminating character, and the exclusion of her evidence showing such request and consent was not reversible error.

Error is assigned for allowing the witness Beulah Thomas to answer certain questions on redirect examination touching the actions of the defendant and her own conduct during her absence from home from the 22d of November to the 7th day of December following. We have examined the record, and find nothing improper in these questions; and, as the defendant has not pointed out to us any particular reason for his statement that they were prejudicial to his rights, we are unable to say that the court erred in allowing them to be asked and answered.

It is contended that the court erred in receiving certain evidence given by Mrs. Thomas, the mother of the prosecutrix. A part of the evidence complained of related to statements made by the defendant to herself and husband, when he was charged by them with having sexual intercourse with their daughter in the barn on February 5, 1903. This evidence was clearly competent; but the gist of the complaint is that the witness stated that a certain letter written by the prosecutrix, which seemed to connect the defendant with the transaction, was read to him at that time, and he was asked what he had to say about it. No statement was made to the jury of the contents of the letter, and as it was not introduced in evidence the defendant could not have been prejudiced by the form of these questions. The rest of the testimony of this witness related to the conditions existing at the barn on the 5th day of February, 1903, what she saw there, and what took place between defendant and her daughter on that occasion. This evidence was clearly competent, and was properly received.

Error is predicated for receiving certain parts of the

testimony of S. A. Thomas, the father of the prosecutrix. That which is particularly complained of was his statement that he swore out a warrant for Blair's arrest, and went down there with the deputy sheriff after him. This evidence, it is claimed, had no tendency to prove the crime charged. In answer to this criticism it is sufficient to say that it was not offered for that purpose, but was offered in connection with the actions of the defendant in concealing the witness at a time when he knew her evidence was necessary in order to proceed with his trial.

It is contended that the court erred in receiving the evidence of Lewis H. Bice, as to the conversations he had with the defendant when employed by him to take the prosecutrix from her home to Anderson's, together with the conduct of the witness and the accused, and the conduct of the accused toward the prosecutrix from the 20th of November, 1903, until the trial of this cause in January, 1904. And it is urged that such testimony could have no tendency to prove the crime with which the defendant was charged. It is apparent that the evidence of Mr. Bice was introduced as an incriminating circumstance tending to prove the crime charged, and for the purpose of showing the conduct of the defendant in secreting the prosecuting witness. All of this testimony was competent for that purpose. It is also said that the jury might not believe that the defendant committed the crime on the 5th day of February, 1903, but that on account of this evidence they might believe that he committed the crime between the 26th of November and the 7th day of December of that year. It is a sufficient answer to this objection to say that there was nothing in the testimony of the witness Bice from which any one could even infer that sexual intercourse had taken place between the accused and the prosecutrix during the time covered by his evidence.

Objection is also made to the testimony of the witnesses Meredith, Newman, Dorsey, Wilcox, and others, relating to the conduct of the accused and the prosecutrix toward each other. As was said in *People v. Castro*, 133 Cal. 11,

65 Pac. 13, evidence of improper familiarity may be received to prove the adulterous disposition of the parties implicated. While it is true the evidence of these witnesses does not directly establish the commission of the crime charged, yet, from the conduct of the parties described thereby, the jury might conclude that it was not improbable that the act of sexual intercourse had taken place between them, as charged. Such testimony would at least tend to corroborate the evidence of the prosecutrix, and corroborating facts and circumstances are always admissible, and should be introduced in evidence when available.

Complaint is also made because the court excluded the evidence of Mrs. Blair and others, offered for the purpose of showing that the prosecutrix had said to them, while she was concealed at the defendant's house, and at other times and places, that the accused had never wronged her, or misused her in any way, and the reason she did not go home was because her parents were trying to compel her to testify that she had criminal relations with the defendant; that such testimony was false, and that they threatened to punish her for not testifying as they wanted her to, which was to testify to that which was false. When this evidence was offered it was clearly incompetent. The prosecutrix had testified positively that the accused had never had sexual intercourse with her. The testimony offered in no manner tended to dispute her evidence. Therefore it was not competent, when offered, for any purpose. Again, it was hearsay evidence, and amounted, at that time, to nothing more than an attempt to corroborate the evidence of the prosecutrix by her own declarations.

It is further contended that the court erred in permitting counsel to ask the prosecutrix the questions which were propounded to her at the time she was recalled and testified as to the act of sexual intercourse between herself and the defendant on the 5th day of February, 1903, because they were unfair, unreasonable and leading, and,

in fact, suggested to the witness the answers desired. The only criticism which can be truthfully directed against this form of examination is that it was somewhat leading. We have often held that, where the witness clearly appears to be hostile or reluctant in giving testimony, the court in his discretion may permit the prosecution to propound leading questions. It is apparent from the record that the prosecutrix was not only a hostile witness, but also a most reluctant one. This no doubt because of her reluctance to publish her own shame. Therefore leading questions were proper and necessary in this case, and the court rightly so held.

We come now to the question of defendant's request for a continuance of the case, after the prosecutrix was recalled, to enable him to procure the attendance of witnesses to prove that she had told them at different times and places that the defendant had never had sexual intercourse with her at any time, had always treated her well, and never injured her in any way. This application for a continuance was overruled by the court, because it appeared that a large number of the witnesses desired for the purpose above mentioned were present in the court room, and if there were any other witnesses desired for that purpose their testimony would be merely cumulative; that there was no sufficient foundation laid, or showing made, for a continuance of the case. It appears from the record that James Carey, Ira Blair, James Oram, John Walsh, Mary Blair, A. B. Taylor and John Blair were called as witnesses for the purpose above mentioned; that they were all present in court, and testified to the fact that the prosecutrix had told them, at different times and places, that the defendant had always treated her well; had never injured her in any way, and had never had sexual intercourse with her at any time. Only three witnesses of all those subpoenaed by the defendant were absent and failed to testify on that point. When we take into consideration the statement of the prosecutrix that she did not remember whether she made those declarations to the

three absent witnesses, and further consider the fact that their evidence, if produced, would have been merely cumulative, we are constrained to hold that the denial of a continuance in no manner prejudiced the defendant's rights.

It is strenuously contended that the court erred in permitting the state to withdraw its rest after a part of the arguments were made, and recall the prosecutrix for further examination. That this is a matter committed to the sound discretion of the trial court there can be no question. *McClellan v. Hein*, 56 Neb. 600; *Hans v. State*, 50 Neb. 150; *Sieber v. Weiden*, 17 Neb. 582; *Gillette v. Morrison*, 9 Neb. 395; *Tomer v. Densmore*, 8 Neb. 384; *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb. 90; *Pence v. Uhl*, 11 Neb. 320.

In *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 78, the court said:

"It appears from the bill of exceptions that after the closing of the evidence, and the counsel on either side had addressed the jury, the counsel for defendant asked the court to instruct the jury to find for the defendant, on the ground that the plaintiff had not shown by the evidence that any one of the three fires alleged were upon the land described in the petition. Thereupon counsel for the plaintiff moved to reopen the case, to which defendant objected, and counsel stated that he would be unable to proceed with the trial if the case was then opened; which objection was overruled, the case was reopened and the plaintiff allowed to re-examine witnesses as to the locality of the railroad and that of the burned premises. * * * We see no reversible error in the action of the court; but it is not doubtful that it was within the discretion of the court, and tended to the impartial administration of justice and to the economy of litigation."

In *Yeoman v. State*, 21 Neb. 171, the court said:

"After the introduction of other witnesses the defense rested. The district attorney then recalled Amanda Yeoman 'for the purpose of cross-examination.' To this plaintiff in error at the time objected, but the objection was

overruled, to which he excepted, and now assigns the ruling for error. We are not informed whether there was any showing made upon the part of the state or not, but for the purposes of this case we will assume there was not; and yet we do not think there was such an abuse of discretion, if any, on the part of the court as to call for a reversal of the judgment on that ground. A certain reasonable discretion is allowed to the trial court in the conduct of the trial before it, and so long as it is not clear that that discretion has been abused to the prejudice of the party complaining, the action of the trial court will be upheld. In the matter now under consideration we can detect neither abuse of discretion nor prejudice to plaintiff in error."

It appears in the case at bar that after both parties had rested and the arguments had begun, the prosecutrix, of her own accord, sent word to the presiding judge that she desired to correct some misstatements in her former testimony; that she informed the sheriff, in whose custody she had been placed, of such desire; that she sent word to the county attorney that she wished to see him, and informed him, when he called upon her, that she desired to correct her former testimony. The nature of the proposed correction was imparted to the court, and it was clearly shown that she, using her own words, proposed to tell the truth about the matter in controversy. Under these circumstances it was proper for the court to reopen the case and receive her testimony. Refusal to have done so would have been an arbitrary exercise of his discretionary power, and would have resulted in a miscarriage of justice. After the prosecutrix had corrected her former evidence, the trial proceeded the same as though she had given such corrected testimony in the first instance. The defendant was then permitted to complete his defense, and in doing so introduced the evidence of the seven witnesses heretofore named, showing that the prosecutrix had, at other times and places, made statements contrary to her corrected evidence. The defendant was deprived of no substantial ele-

ment of his defense, and was at no time in any worse position than he would have been had her testimony, as corrected, been delivered when she was first called to the witness stand. The record discloses neither an abuse of discretion nor prejudice to the defendant.

Complaint is made because the court overruled the defendant's objection to the appearance of counsel, alleged to have been retained by private parties, to aid in conducting the prosecution. It is the common practice in this state to permit such counsel to appear whenever a request is made therefor. *Polin v. State*, 14 Neb. 540; *Bradshaw v. State*, 17 Neb. 147; *Gandy v. State*, 27 Neb. 707. It is stated, however, that the county attorney did not request the appointment of private counsel to assist him, and the court did not appoint the counsel for that purpose. On that question the record is silent. However, the fact that private counsel assisted the county attorney in the prosecution, with his entire sanction, raises a strong presumption of request and appointment. Again, the objection of the defendant to the appearance of such counsel was not made at the proper time, nor in an available manner. It appears that during the examination of the prosecutrix the objection was made, and the record on that question is as follows: "Q. I will ask you, Miss Thomas, if you were ever upstairs in this sleeping room when Mr. Blair came up there where you were, at any time in the year 1901 or 1902? Objected to. Incompetent. Immaterial. No evidence on the matter of her going upstairs; no foundation laid for question, and leading. Overruled. Defendant excepts. It is objected to attorneys Mr. Merton Meeker, Arthur G. Wray and Mr. Frederick C. Power, and each of them, appearing on the part of the state to prosecute this case, as the county attorney is here in his official capacity, able and ready to take part in the prosecution. Overruled. Defendant excepts." This was the only objection interposed to the appearance of such counsel. It will be observed that the objection was made during the trial, and in connection

with an objection to a question propounded to the prosecuting witness. No statement was made, or evidence offered, showing, or tending to show, that the prosecution had not requested the assistance of counsel, or that the court had not properly appointed them to render such assistance. Again, it is not apparent from an examination of the record that the part taken by assistant counsel in the prosecution of this case tended in any manner to prejudice the defendant's rights.

It is urged that the district court erred in giving instruction No. 6, which reads as follows: "6. The jury are instructed that the material allegations of the information upon which the defendant is prosecuted in this case are as follows: First. That the defendant John Blair, at the time of the intercourse with which he stands charged in the information, was a male person over the age of 18 years. Second. That said Beulah Thomas, at the time of the intercourse with which the prisoner stands charged in the information, was a female child under the age of 18 years. Third. That on or about the 5th day of February, 1903, and within three years prior to the 9th of January, 1904, the said defendant made an assault upon said Beulah Thomas, and did carnally know and abuse her. Fourth. That said Beulah Thomas, at the time of the intercourse with which the prisoner stands charged in the information, was chaste, as defined in these instructions. Fifth. That the crime charged in the information was committed in York county, and state of Nebraska, and since the 9th day of January, 1901, and prior to the 25th day of April, 1903."

The contention is that this instruction was erroneous and prejudicial to the rights of the defendant, in that it permitted the jury to find the defendant guilty of a crime of the character alleged in the information at any time up to and including the 9th day of January, 1904. Reading the several paragraphs of this instruction together, and giving the whole a fair construction, it is apparent that the jury could not have been misled thereby. Again, it is clearly and explicitly stated in the fifth subdivision

the defendant in any way with removing the prosecutrix from her home and concealing her whereabouts from the prosecution was relevant, and therefore properly received. The fact that this was done with the consent, and at the request, of the prosecutrix does not rob it of its incriminating character, and the exclusion of her evidence showing such request and consent was not reversible error.

Error is assigned for allowing the witness Beulah Thomas to answer certain questions on redirect examination touching the actions of the defendant and her own conduct during her absence from home from the 22d of November to the 7th day of December following. We have examined the record, and find nothing improper in these questions; and, as the defendant has not pointed out to us any particular reason for his statement that they were prejudicial to his rights, we are unable to say that the court erred in allowing them to be asked and answered.

It is contended that the court erred in receiving certain evidence given by Mrs. Thomas, the mother of the prosecutrix. A part of the evidence complained of related to statements made by the defendant to herself and husband, when he was charged by them with having sexual intercourse with their daughter in the barn on February 5, 1903. This evidence was clearly competent; but the gist of the complaint is that the witness stated that a certain letter written by the prosecutrix, which seemed to connect the defendant with the transaction, was read to him at that time, and he was asked what he had to say about it. No statement was made to the jury of the contents of the letter, and as it was not introduced in evidence the defendant could not have been prejudiced by the form of these questions. The rest of the testimony of this witness related to the conditions existing at the barn on the 5th day of February, 1903, what she saw there, and what took place between defendant and her daughter on that occasion. This evidence was clearly competent, and was properly received.

Error is predicated for receiving certain parts of the

testimony of S. A. Thomas, the father of the prosecutrix. That which is particularly complained of was his statement that he swore out a warrant for Blair's arrest, and went down there with the deputy sheriff after him. This evidence, it is claimed, had no tendency to prove the crime charged. In answer to this criticism it is sufficient to say that it was not offered for that purpose, but was offered in connection with the actions of the defendant in concealing the witness at a time when he knew her evidence was necessary in order to proceed with his trial.

It is contended that the court erred in receiving the evidence of Lewis H. Bice, as to the conversations he had with the defendant when employed by him to take the prosecutrix from her home to Anderson's, together with the conduct of the witness and the accused, and the conduct of the accused toward the prosecutrix from the 20th of November, 1903, until the trial of this cause in January, 1904. And it is urged that such testimony could have no tendency to prove the crime with which the defendant was charged. It is apparent that the evidence of Mr. Bice was introduced as an incriminating circumstance tending to prove the crime charged, and for the purpose of showing the conduct of the defendant in secreting the prosecuting witness. All of this testimony was competent for that purpose. It is also said that the jury might not believe that the defendant committed the crime on the 5th day of February, 1903, but that on account of this evidence they might believe that he committed the crime between the 26th of November and the 7th day of December of that year. It is a sufficient answer to this objection to say that there was nothing in the testimony of the witness Bice from which any one could even infer that sexual intercourse had taken place between the accused and the prosecutrix during the time covered by his evidence.

Objection is also made to the testimony of the witnesses Meredith, Newman, Dorsey, Wilcox, and others, relating to the conduct of the accused and the prosecutrix toward each other. As was said in *People v. Castro*, 133 Cal. 11,

AACHEN & MUNICH FIRE INSURANCE COMPANY, APPELLANT,
V. CITY OF OMAHA ET AL., APPELLEES.

FILED OCTOBER 20, 1904. No. 13,824.

1. **Taxation: FOREIGN INSURANCE COMPANIES.** Under the first clause of section 1, article IX of the constitution of this state, which enacts, "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises," property and franchises within the state must be taxed according to valuation, and no discrimination can be made between foreign or domestic fire insurance companies as to taxes laid under this subdivision.
2. ———: **CONSTITUTIONAL LAW.** A tax upon the gross amount of premiums received by a foreign fire insurance company during the preceding year within the county, town, city, village and school district where the agent conducts the business is not a tax upon property required to be laid under the first clause of section 1, article IX of the constitution, but is a tax upon insurance interests or business, and is authorized by the second subdivision of said section. *Phoenix Ins. Co. v. City of Omaha*, 23 Neb. 312, distinguished.
3. ———: ———. Under the second clause of said section, providing for the taxation of persons because of the businesses or occupations in which they shall be engaged, a tax possesses the requisite character of uniformity if the persons subject to it are duly divided into classes, and the law operates on the members of each class uniformly under substantially the same circumstances and conditions.
4. ———: ———. Section 6 of article IX of the constitution provides affirmatively that taxes on persons for corporate purposes shall be levied by municipal authorities under powers vested in them by the legislature for that purpose, and by section 7 of that article the legislature is forbidden to levy taxes upon persons or property for the corporate uses of municipal corporations. That which is forbidden to be done directly cannot lawfully be done by indirection.
5. ———: ———. For the purposes of taxation under either section 1 or section 6, article IX of the constitution, insurance companies not organized under the laws of this state may be treated as a single class, and taxed at a rate different from that imposed upon such corporations that are so organized.

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6. ———: ———. Section 7, article IX of the constitution, prohibits the legislature from imposing taxes on municipal or other corporations, or the inhabitants or property thereof, for corporate purposes. *Held*, That the tax sought to be imposed upon the appellant fire insurance company was attempted to be imposed under the direct authority of the legislature, and is in conflict with the provisions of said section. *State v. Wheeler*, 33 Neb. 563, followed.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed*:

Greene, Breckenridge & Kinsler, for appellant.

C. C. Wright and W. H. Herdman, contra.

BY THE COMMISSION.

This is a proceeding in error from a judgment of the district court for Douglas county sustaining a general demurrer to the petition and dismissing the action. The action was brought by the Aachen & Munich Fire Insurance Company, a foreign corporation, for the purpose of restraining the city of Omaha and August H. Hennings, the city treasurer, from enforcing and collecting a tax which was assessed for municipal purposes by the tax commissioner of that city upon the gross premium receipts within the city of Omaha of the plaintiff for the preceding calendar year, under section 58 of the revenue law (article I, chapter 77, Compiled Statutes, 1903; Annotated Statutes, 10457). The grounds upon which the plaintiff seeks to declare the tax void are as follows: Discrimination between fire insurance companies organized under the laws of other states or countries and domestic fire insurance corporations; also discrimination between foreign life, accident and surety companies and foreign fire insurance companies; and further, that section 58, which provides for the assessment and taxation as property of the gross premium receipts during the preceding year of foreign fire insurance companies, is void because it lays a property tax on incomes for a previous year without regard

to the actual existence in the state of any taxable property. That section 58 is void by reason of the discriminations, privileges and immunities in sections 59, 60 and 61 in favor of other insurance companies; and that the act is broader than its title.

In the brief of plaintiff and in the oral argument our attention has mainly been directed to the following propositions: First, that the tax is void because it is a tax on money not within the jurisdiction of the state or taxing districts at the time it was levied. Second, that section 58 of the revenue law, under which the tax commissioner and the city treasurer of Omaha are seeking to proceed, authorizes all taxing districts within the state to assess and tax the gross receipts of foreign fire insurance as items of property, the same as property and franchises are assessed and taxed under the provisions of the first clause of section 1, article IX of the constitution, and is therefore void. Third, the tax is void because section 58 authorizes the taxing districts mentioned therein to impose a larger burden upon the property of foreign fire insurance than it authorizes them to impose upon the property of other insurance companies doing business in this state, and, in this respect, provides for an unjust and arbitrary discrimination upon the property of foreign companies for the purpose of taxation. Fourth, that section 58 does not operate uniformly upon all insurance companies which are members of the same class within the meaning of the constitution.

The question which lies at the very threshold of the investigation in this case is under which, if either, of the two clauses of section 1, article IX of the constitution, can such a tax as this be upheld? Section 1, article IX of the constitution of the state of Nebraska, is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct,

and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." By the first clause of this section it is directed that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." A tax laid under this subdivision is imperatively required to be levied by valuation, so that the tax shall be in proportion to the value of "property and franchises." Under these provisions there can be no discrimination between persons or classes. Every person and every corporation must be taxed alike by valuation. The law knows no distinction between persons or corporations, or between foreign or domestic corporations, under the powers granted by this clause. This court said, by SULLIVAN, C. J., in *State v. Fleming*, 70 Neb. 523, in speaking of foreign insurance corporations:

"Such companies have no authority to transact business in this state without the consent of the state, and, when they seek the privilege, they must comply with the conditions imposed. After coming here, their property must be dealt with on terms of equality with the property of the citizen. It is subject to no further burden in the way of taxation than is imposed upon the resident, but, for the privilege of doing business here, they must submit to such conditions as the legislature sees fit to impose."

The legislature has no power to impose a tax by valuation upon the property of foreign fire insurance companies within this state, and at the same time exempt domestic fire insurance companies from a like burden. If such a discrimination were made, it could not be upheld. If the tax of which complaint is made in this case, there-

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fore, is a tax upon property, there is a manifest discrimination made between the property of foreign and domestic fire insurance companies. But is it a tax upon property? Under the facts stated in the petition and admitted by the demurrer, much the greater part of the money received for premiums during the preceding calendar year was not in the state when the assessment was made. The money received for premiums had been sent out of the state, and only a small amount was actually within manual reach of the taxing officers. It is an elementary proposition that the state has power to tax all property within its limits, but it cannot reach outside and lay its hands on the property of nonresidents not within its sovereignty. *Clother v. Maher*, 15 Neb. 1; *Finch v. York County*, 19 Neb. 50; *Judson*, Taxation, secs. 391, 431. The theory of taxation is that each individual shall contribute to the state a fair proportion of his substance within its limits in return for the protection to his person and his property afforded him while within its jurisdiction. This excludes the idea of tangible property lying within the confines of another state which belongs to residents of the foreign state, and which may properly be and usually is taxed for the support of the government of that state, being subject to taxation in this state. The general rule is that the domicile of the owner is the *situs* of personal property for the purpose of taxation. This rule has its exceptions, and the legislature has the power, where personal property is actually within this state, to separate it from the domicile of a nonresident owner for the purpose of taxation. When, however, both the residence of the owner and his tangible personal property are outside of the limits of the state, no power exists in the legislature to make such property a subject of taxation.

It is strongly urged by the plaintiff that the language of the law reciting that such gross receipts are "to be taken as an item of property of that value, to be assessed and taxed on the same percentage of such value as other property," clearly and irrefutably shows that the tax is a tax upon

property and therefore void. But we think we are not driven to this conclusion, and that the language, "to be taken as an item of property of that value," may be reasonably construed as a direction to the assessing officer as to how it is to be listed in his schedules, and is not an authoritative declaration and classification of the tax as a property tax. Even if it were such a declaration, the fact that the legislature called that a property tax which was not a property tax, and that the name was a misnomer, would not invalidate the tax if it were otherwise valid as a proper exercise of the taxing power under the authority conferred by the constitution. It is never presumed that the legislature enacted a law with the intention of violating the constitution, and it is a sound rule that if two reasonable constructions of a statute may be made, one of which will not violate the organic law while the other will, that construction is to be preferred which is in accordance with constitutional provisions. The tax in question is not a license tax imposed upon this corporation as a condition precedent to being allowed to do business in this state; no element of police power enters into it; its purpose is merely to raise revenue; it is a tax upon the business of transacting fire insurance by a class of fire insurance companies who are incorporated in other states and foreign countries. It is not a property tax, but it is a tax on insurance interests which is a business tax, and is not authorized by the first subdivision of section 1, article IX of the constitution.

It is true that in the case of *Phoenix Ins. Co. v. City of Omaha*, 23 Neb. 312, the gross premiums received by every insurance company, other than mutual companies without capital stock within this state, during the year previous to the year of listing in the county where the agent conducts the business, were held to be assessable and taxable as personal property in the hands of such agent. But in that case it is said by Justice COBB:

"I do not understand the plaintiff in error to raise a question as to the constitutionality of the revenue law

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(chapter 77, Compiled Statutes, 1887), as a whole, or of any section or provision of it. Its contention is, that the earned premiums of insurance companies of the class to which it belongs are not among the subjects of taxation within its provisions; and secondly, if they are classed among the subjects of taxation by state and county authorities, yet, that cities have not been vested with authority to tax them for municipal purposes."

The court, therefore, in that case only passed upon these questions, and the constitutionality of the provisions of the law was not considered. The case, therefore, is readily distinguishable from the case at bar, where the issue of constitutionality is distinctly raised. That case merely construed the statute, while the instant case attacks the validity of the enactment itself. We are not bound, therefore, by the holding in that case that such premiums were assessable and taxable as property.

We shall next inquire whether authority to impose such a tax is conferred by the second clause or subdivision of section 1, article IX of the constitution, which is as follows: "It" (the legislature) "shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." We have already seen that the tax is not a property tax laid by valuation, but is a tax upon business. A tax upon "insurance interests or business" is expressly authorized by this subdivision, so that, if the tax complies with the further requirement of uniformity as to the class upon which it operates, it may be upheld as a valid exercise of taxing power. By section 58, foreign fire insurance companies are placed in a class by themselves, and it is argued by the plaintiff that the effect of this action, in thus segregating foreign fire insurance companies from other fire insurance companies, is to unjustly and arbitrarily discriminate against them as between

themselves and all other insurance companies, and that the tax is not "uniform as to class." If, as is contended by the counsel for plaintiff, all insurance companies necessarily belong in the same class for taxing purposes, there can be no escape from the conclusion which they draw; but is there not such a difference in conditions, manner of doing business, place of organization, disposition of premium receipts, and other matters, as to justify the division or classification made between foreign and domestic companies doing fire insurance business? A classification to be valid must not be arbitrary. It must rest upon some real distinction, and unless it does so it cannot be upheld. *Rosenbloom v. State*, 64 Neb. 342. There is a real distinction, and not an artificial or arbitrary one, between a domestic and foreign corporation of this nature which is clear and obvious. In *Hughes v. City of Cairo*, 92 Ill. 339, the constitutionality of a statute which authorized the cities and villages of the state of Illinois to impose a tax upon the premium receipts of foreign insurance companies doing business within their respective limits was assailed, but the court upheld the imposition levied as a valid exercise of the power of taxation. With reference to classification for the purposes of taxation the court say:

"The error of the position taken consists in assuming that all insurance companies, whether foreign or domestic, constitute a single class, indivisible, for taxation, under this section of the constitution. This is a mistaken view of the law. There is and can be no reason why insurance companies may not be divided into classes, consisting of foreign and domestic companies, and burdens imposed on the former that are not imposed by any general law on the latter class, without an infraction of any provision of the constitution. In *Ducat v. City of Chicago*, 48 Ill. 172, this court recognized the fact such distinctions might be taken under that clause of the 5th section of article IX of the constitution of 1848 that required all taxes imposed by municipalities 'to be uniform

in respect to persons and property within the jurisdiction of the body imposing the same.' The principle of that case is conclusive of the one at bar."

In the absence of constitutional restraints, the power of the legislature over taxation is as unlimited as the subject with which it deals. In our constitution, that power is restrained in two particulars only, namely, taxes upon property and franchises are required to be levied in proportion to value, and taxes upon persons or occupations are to be uniform with respect to the classes affected by them, but the legislature is left with a free hand in the matter of classification, and as to what classes shall be taxed and what exempt, and as to the gravity of the burden imposed upon the former. It is only required that such taxes for general state revenue purposes shall be levied in accordance with a uniform rule, and that those levied by municipal corporations shall be imposed by corporate authorities in the exercise of powers conferred upon them by the legislature. As is said in 2 Cooley, Taxation (3d ed.), 1094:

"It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution."

In consonance with this principle, the supreme court of Kansas in *Phœnix Ins. Co. v. Welch*, 29 Kan. 672, speaking by Mr. Justice Brewer, say:

"It matters not whether this charge upon the plaintiff is to be regarded in the nature of taxation or a license. In neither case is it justly obnoxious to the charge of unequal-

ity in the sense that would make it unconstitutional. The legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. Thus, within the state municipalities are classified by population, and the authorized rate of taxation is, or may be, very different in each. Here foreign insurance corporations are classified by the states from which they come, and when we consider the purposes of such classification it cannot be held that there is anything arbitrary or unjust therein." To the same effect are *Scottish Union and National Ins. Co. v. Herriott*, 109 Ia. 606, 80 N. W. 665; *City of Dubuque v. Northwestern Life Ins. Co.*, 29 Ia. 9; *State v. Insurance Company of North America*, 115 Ind. 257, 17 N. E. 574. We are of opinion, therefore, that the conclusion reached by this court in *State v. Fleming*, 70 Neb. 523, upholding the separate classification and special discriminating taxation of foreign insurance companies, is right and ought to be adhered to, and we are of opinion that abundant justification therefor is found in the revenue clauses of the constitution and in judicial opinions. *Hughes v. City of Cairo*, and *Ducat v. City of Chicago*, *supra*.

It is further argued that the tax does not act uniformly upon all insurance companies which are members of the same class, and is therefore void. With this contention we cannot agree. Mr. Cooley in his work on Taxation (Vol. 1, 3d ed., p. 261), in discussing the requirement of uniformity, states that a business tax may be a sum whose amount is regulated by the business done or income or profits earned, and further, "If a state, for example, were to decide to levy an occupation tax upon one of the learned professions, it might decide to lay the same tax upon each member, or it might discriminate so that the tax should be proportioned to the professional income. Either course would be admissible provided the rule were made general." It is said in *Worth v. Wilmington & W. R. Co.*, 89 N. Car. 291:

"The governing principle is not that the same specific tax shall be paid by each, as a form of capitation tax, but that, whether levied upon and measured by the amount of gross or net earnings or other standard, as upon real or personal estate, there shall be no discrimination made among individuals of a class, based upon privileges and immunities secured to one under contract and not to another."

The constitution of California requires that taxation shall be equal and uniform, but it was held in *City and County of Sacramento v. Crocker*, 16 Cal. 119, that the requirement of uniformity was not violated by a tax upon business graduated by the amount of sales. In *Templeton v. Tekamah*, 32 Neb. 542, an ordinance was held valid which levied the sum of \$10 upon each person, firm, association or corporation, keeping or using any stallion or jack for breeding purposes within the corporate limits of Tekamah. See also *Magneau v. City of Fremont*, 30 Neb. 843. A business or occupation tax levied by a municipal corporation, which bases the amount of the tax according to the number of pool tables used, or the quantity of any mercantile commodity sold, or upon the amount of the gross receipts of a street railroad, gas or electric light company, or the gross premiums received by an insurance company, complies with the rule of uniformity with respect to persons, and is not violative of the constitution in that respect. If the burden is equal as to all in the same occupation under the same conditions, it is uniform as to persons. *Rosenbloom v. State, supra*.

The plaintiff further contends that, since each member of the class is required to pay a tax proportionate to its annual gross receipts, and since the rate of taxation may be and usually is different in the various local taxing districts, the tax is not uniform by reason of this variability, and that therefore it violates the constitutional rule of uniformity and the section is consequently void. We cannot accept this conclusion. Much the larger part of the most important powers and duties of the state have

to do with the administration of law in its political subdivisions, like counties, towns and school districts. Diversities of circumstances among such localities occasion difference in the amount of expenditure requisite for the administration of the same general laws in all of them. Not necessarily, but as a matter of convenience and justice, the state distributes the burdens of taxation in proportion to the differences of expenditure, and commits the administration of the laws relative thereto to local administrative boards and officers, but the powers and duties in these respects which the latter perform are not the less, on that account, the exercise of the functions of state government. The variability of which the plaintiff complains is therefore one which arises from the operation of uniform laws, and is due only to difference in the local circumstances to which they have application. If a company is taxed more in one county, township, or school district than it would be in another, it is not because of the want of uniformity in the operation of the law, but because it chooses to transact its business in the former locality rather than in the latter. To borrow a phrase from the interstate commerce law, all the companies are subjected to the same burdens under substantially the same circumstances and conditions.

Counsel for the city attempts to uphold the tax by saying that section 58 defines the annual gross premiums of an insurance company as property, and assesses their value for the purpose of taxation at their aggregate amount, and thus brings them within the operation of the clauses of the city charter which authorize levies for municipal revenue purposes upon all taxable property within the corporate limits. Counsel for the plaintiff argue that, for this very reason, the section is wholly void as attempting to levy as a tax by valuation under the first clause of section 1, article IX of the constitution, what could only be imposed as a tax upon persons under the second clause of that section. We are unable to agree with either contention. Section 12 (Annotated Statutes, 10411)

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of the revenue law provides that property "shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value." If the gross annual premium receipts of an insurance company are entered upon the lists, the company will be compelled to pay upon them the same percentage which is exacted for general state purposes upon the actual value of taxable property in the locality in which its business is carried on. As we have already attempted to show, such an exaction would not violate the rule of uniformity prescribed by the second clause of section 1, article IX of the constitution, and it may therefore be upheld as an exercise of the power conferred by that section, although the legislature, perhaps, had not that clause in view when they framed and adopted the act.

Lastly, it is further urged that the tax is void because it is an attempt of the legislature to levy a tax for municipal purposes directly. Section 7, article IX of the constitution, provides as follows: "Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal corporations. The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." It is admitted by the demurrer that the assessment complained of was made by the tax commissioner of the city of Omaha for municipal purposes only. The power to tax is inherent in the legislature. It may, under the authorization of section 6, article IX of the constitution, which is as follows: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same"—vest municipal corporations with authority to assess and collect taxes for corporate purposes, but, unless such au-

thority has been expressly delegated to the municipal authorities by an act of the legislature, the power to impose the same does not vest in the municipality. This proposition is so elementary that the mere statement of it is all that is necessary. In the recent case of *State Board of Tax Commissioners v. Holliday*, 150 Ind. 216, 49 N. E. 14, cited and followed in *Hart v. Smith*, 159 Ind. 182, 64 N. E. 661, the principle is stated as follows:

"The power of taxation is a sovereign power and belongs exclusively to the legislative department of the government. * * * Where the legislature has not exercised this power, no other department of the state government can supply the omission; and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed."

Legislative acts under which the authority to impose taxes is asserted are to be strictly construed. *People v. Chicago & A. R. Co.*, 194 Ill. 51, 61 N. E. 1064; *State v. Irey*, 42 Neb. 186. The defendants rely upon section 58 of the revenue law as their authority for the imposition of the tax, but if this is the only authority they have, then they are attempting to enforce a tax for municipal purposes imposed by the legislature directly upon the property within a municipal corporation for corporate purposes. By section 7, article IX of the constitution, the legislature is forbidden to impose taxes upon municipal corporations, or upon the inhabitants or property thereof, for corporate purposes.

In *State v. Wheeler*, 33 Neb. 563, the defendant in error was informed against for the violation of a law which required the payment to two per cent. of the gross premium receipts of foreign fire insurance companies within cities and villages as a duty or rate for the support of fire companies. It was contended upon behalf of the state that it was not a tax but a license fee imposed as a condition precedent to doing business, but this court held the exaction was not a license fee but a tax, and therefore violated the constitutional provisions inhibit-

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ing the imposition of a tax by the legislature upon the inhabitants or property of municipal corporations for corporate purposes.

In *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, 139, this court say:

"This section has received consideration from this court in *State v. Wheeler*, 33 Neb. 563, and *German-American Fire Ins. Co. v. City of Minden*, 51 Neb. 870. Speaking with reference to the first case, it is said in the latter: 'It is quite evident that it (the act considered in the first case) was held bad because it was an attempt by the legislature, not to empower municipal corporations to impose a tax for corporate purposes, but to impose by the legislature itself a tax for corporate purposes on the inhabitants and property of the municipal corporation, this being forbidden by section 7, article IX of the constitution.' If, then, the legislation now objected to is, in effect, the imposition of a tax by the legislature itself on the property of the defendant, and not an authority to the city to do it, the act would be void." *City & County of San Francisco v. Liverpool and London and Globe Ins. Co.*, 74 Cal. 113, 15 Pac. 380.

We are of opinion that the levy of taxes complained of in this action is void because the assessment was not made pursuant to any ordinance or authority of the city of Omaha, but under the supposed direct authority of section 58 of the revenue law, and therefore was a violation of section 6 and section 7 of article IX of the constitution.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, APPELLEE,
V. CITY OF OMAHA ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,825.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

C. C. Wright and W. H. Herdman, for appellants.

J. J. Sullivan and Greene, Breckenridge & Kinsler,
contra.

BY THE COMMISSION.

This case differs from that of *Aachen & Munich Fire Ins. Co. v. City of Omaha*, *ante*, p. 518, only in the kind of insurance appellee writes. The decision in that case is decisive of this also. It is therefore recommended that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

JANE C. SIMMONS, APPELLANT, v. LURINDA KELSEY ET AL.,
APPELLEES.

FILED OCTOBER 20, 1904. No. 13,626.

Abatement. Section 45 of the code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. In such cases a duty devolves upon the court to take such steps as shall become necessary to protect and preserve the rights of the incapacitated party.

APPEAL from the district court for Johnson county:
JOHN S. STULL, JUDGE. *Reversed.*

S. P. Davidson, for appellant.

E. B. Quackenbush, Ed M. Tracy, Hugh La Master and J. C. Moore, contra.

AMES, C.

The plaintiff, a woman nearly 80 years old, entered into a written agreement with the defendants, her heirs at law, for the immediate distribution of her estate among them. There was no consideration moving to her, and she was admittedly lacking in full contractual capacity, and there is evidence that she yielded to united and persistent importunity by the heirs. All parties are agreed that for one reason or another the agreement was and is wholly void, but it has been in large part carried into execution. The object of this action is to procure its cancelation, in so far as it remains unexecuted, and to obtain and retain for the plaintiff undisputed possession and enjoyment of the undistributed portion of her estate.

The defendants, among other defenses, pleaded in abatement that the plaintiff was of insufficient mental capacity to manage or control her own affairs or to begin and prosecute the action, and all parties pleaded her incapacity to make the alleged contract in controversy. The court by final decree found that the plaintiff "is and was for a

long time prior to the commencement of this action an incompetent person, and at the time of the commencement of this action was incapable and incompetent to have charge, direction and management of her own property and business." Just what was meant by this finding is difficult to be understood. It was not followed by its logical consequence, the abatement of the action or an order suspending proceedings to await the appointment and appearance of a guardian, but was succeeded by a general finding in favor of all the defendants, except as to a particular tract of land which had been conveyed to one of them, and concerning which no specific adjudication was made, and by a decree dismissing the action generally, not without prejudice but as upon its merits, thus in practical effect affirming a transaction which, as we have said, all the parties united in denouncing as void. The plaintiff appealed, and a reversal of the judgment appears to us to be a matter of course. Whatever may have been the mental capacity of the plaintiff at the time she signed the agreement, there can be no doubt that that document was void for want of consideration and because it was extorted by means of undue influence amounting to a kind of duress *per minas*. If she subsequently became demented, as the court perhaps intended to find, that fact did not justify the remaining findings or the decree. Mental imbecility is not a ground for the judicial forfeiture of the rights or estate of a person afflicted thereby. But such examination of the record, which is quite voluminous, as we have been able to make, convinces us that the plaintiff was, at the beginning of the action and at the time of the trial, of sufficient understanding to decide rationally upon taking that step and upon prosecuting the suit with a view to preserving to herself sufficient of her property for her maintenance during the remainder of her life. Section 45 of the code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. If before the termination of the litigation she shall become incapaci-

Lincoln Safe Deposit & Trust Co. v. Weston.

tated, a duty will devolve upon the court, as the general conservator of the estates of all persons under disabilities, to see to it that her rights and estate are protected and preserved, either by a general guardian or by a next friend or guardian *ad litem* appointed by the court for the purposes of the action.

The situation of the parties and of the property in dispute is such that a final disposition of the cause cannot conveniently be made by this court, and it is recommended that the judgment of the district court be reversed and the suit remanded for further proceedings in accordance with law.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the suit remanded for further proceedings in accordance with law.

REVERSED.

LINCOLN SAFE DEPOSIT & TRUST COMPANY v. CHARLES WESTON, AUDITOR OF PUBLIC ACCOUNTS.

FILED OCTOBER 20, 1904. No. 13,726.

Claim against State. A creditor of the state is not excused from presenting his claim to the auditor of public accounts for settlement and allowance within two years after its accrual by the fact that the legislature has not made an appropriation for its payment.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

W. E. Stewart, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, *contra.*

AMES, C.

Section 22, article III of the constitution of this state, prescribes that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." Section 24 of article I of chapter 4 of the Compiled Statutes of 1901 provides for the payment of a bounty out of the state treasury to persons killing wolves in this state. Preliminary to such payment the statute requires that the person seeking it must make certain proofs before the clerk of the county in which the killing is alleged to have taken place, and that the county clerk, if satisfied with the truth and sufficiency of such proofs, shall make and deliver to the claimant a certificate to that effect, and that upon the presentation of such certificate to the auditor of public accounts the latter should draw his warrant for the amount named therein against the general funds in the state treasury. This statute was repealed by an act approved February 27, 1903 (Laws 1903, ch. 2). An act approved April 11, 1903 (Laws 1903, ch. 159), entitled, "An act making an appropriation for the payment of miscellaneous items of indebtedness owing by the state of Nebraska" contains the following lines: "Wolf bounty claims (estimated) \$40,000." There had been no previous similar appropriation affecting the present controversy. Section 9 of article III of chapter 83 of the Compiled Statutes (Annotated Statutes, 9097) enacts that "in cases of claims, the adjustment and payment of which are not provided for by law, no warrant shall be drawn by the auditor, or countersigned or paid by the state treasurer, but all such claims shall be reported to the next legislative assembly, with such recommendation as the auditor may deem just"; and section 6 of the same article (Annotated Statutes, 9094) requires that "all persons having claims against the state shall exhibit the same, with evidence in support thereof, to the auditor, to be audited, settled and allowed within two years after such claims shall accrue."

Reading these two sections together, there seems to be but little, if any, room for doubt that the absence of an appropriation for the payment of a valid claim against the state does not excuse the claimant from presenting it to the auditor for settlement and allowance within the two years prescribed by the statute. In case of such absence, if the auditor deems the claim just and lawful, it is made his duty to report that fact to the legislature, and withhold his warrant until that body has provided funds for its payment. In such a case the legislature is the final court of appeal, although an intermediate or, rather, collateral appeal may be prosecuted in the courts. The plaintiff is the assignee for value of a large number of claims of the description mentioned aggregating in amount \$288. Each of them has been duly proved before the county clerk of the county in which it arose, and the statutory certificates were filed with the auditor of state for allowance and payment, but a number of them aggregating \$160, not until after the lapse of more than two years from their respective dates. These latter the auditor rejected, and an appeal was taken to the district court. The foregoing facts were disclosed on the face of the petition, to which a general demurrer was sustained, and the action was dismissed. The plaintiff prosecutes error.

We have already given, in substance, our reasons for thinking there is no error. The claims certainly did not "accrue"—that is, become established as lawful demands against the state—later than at the date at which lawful proof of them was made before the county clerk, and the latter issued certificates to that effect. We cannot think that the delay of the legislature to make provision for the payment of such demands operated in any manner to the prejudice of the claimant's rights as a creditor entitled to immediate payment. Nor can it be doubted that a creditor having an admitted or duly established demand, and so entitled, has an accrued claim which the statute requires him to present to the auditor for settlement and allowance within two years under penalty of being barred.

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The appropriation act, above quoted, does not purport to remove the bar, but makes provision for the payment of existing claims, and cannot be regarded as applying to such as had already become extinguished by the statute of limitations. We therefore recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V.
MOSES ROBERTS.

FILED OCTOBER 20, 1904. No. 13,658.

Evidence examined, and held not sufficient to sustain the judgment of the trial court.

ERROR to the district court for Johnson county: GEORGE W. STUBBS, JUDGE. *Reversed and dismissed.*

J. W. Deweese, F. E. Bishop and S. P. Davidson, for plaintiff in error.

L. C. Chapman and George A. Adams, contra.

OLDHAM, C.

This cause of action is before the court for a second review on error. The first time it reached this tribunal every issue involved in the controversy was ably and carefully reviewed in an unofficial opinion by POUND, C., which may be found in 3 Neb. (Unof.) 425. At this hearing the cause was reversed and remanded because the evidence was not sufficient to support the judgment. On a new trial, directed by this court, substantially the same evi-

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dence as that reviewed by the learned commissioner at the first hearing in this court was submitted, and plaintiff again had judgment, from which defendant prosecutes a second review to this court by petition in error.

When the cause was reversed and remanded, plaintiff filed an amended petition, in which it sought to charge negligence on defendant's part in the following allegation:

"That at said time, and as the plaintiff was attempting to cross at said public crossing from the south to the north, and after he had stopped and looked and listened, and saw no approaching object, or heard none, and after so looking and listening, and after he had started across said track to the north, and just as he was approaching said crossing from behind said line of box cars standing on said switch, as above mentioned, the defendant, by its employees, carelessly and recklessly ran at a high and rapid speed a hand car down and along said main track of said defendant's railroad from the west toward the east, carelessly, negligently and recklessly running the same down from behind the said line of box cars to, upon and immediately in front and under the heads of the horses of the plaintiff, which he was then driving, and by so doing, and by such reckless, careless and negligent running and operating of said hand car, scared and frightened said horses by its negligently coming upon and immediately in front of them and under their heads suddenly, and from behind said line of box cars, so that said horses at once became frightened."

The only additional evidence introduced at the last trial was that of witness Smith, who testified, in substance, that he was 75 or 100 yards north of the railroad, and saw the hand car after it had passed the depot, and that he thought the car was going a little faster than was usual in the yards. On cross-examination he said: "I could not tell you how fast it was going, because I had no time to see how fast it was running. I said I thought they were running a little faster than the usual gait." Witness Kelly

also testified in addition to what he said at the former hearing, in answer to the question, "At this time it was going along in just a usual manner, was it not? A. I guess it was the usual rate; I do not know what the usual rate of speed is; it was running not extremely fast nor extremely slow." The plaintiff also extended his testimony from what it had been at the former hearing by saying, in substance, that the hand car seemed to be running at a rapid rate when it brushed in front of his team. This was practically all the additional evidence introduced at the last hearing. As will be noticed by an examination of the amended petition, plaintiff relied for a recovery on the negligence of defendant in running its hand car at an unusual and dangerous rate of speed at the public crossing where the injury took place; and in conformity with this theory the court instructed the jury, at plaintiff's request, that:

"You are further instructed that it is the duty of every reasonable man to exercise caution to the extent necessary to guard against the particular or obvious danger with which he is confronted, and that in all circumstances he is required by the law to use such care and caution as an ordinary, reasonable and prudent person would exercise under such circumstances."

All the evidence introduced by defendant tended to show that the hand car was run in a reasonable and careful manner, at a rate not to exceed 5 or 6 miles an hour, up to and at the place of the accident, and as there was no testimony introduced by plaintiff tending to show an unreasonable or dangerous rate of speed, we are compelled to say for the second time that the judgment of the lower court is unsupported by any competent testimony. When the cause was here for review at the first instance, the writer of the present opinion said:

"I concur generally in every proposition discussed by my learned associate in this opinion, but as all evidence possible for the plaintiff to procure tending to show actionable negligence on the part of the railroad appears to have

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been produced at the trial in the court below I see no good reason for remanding this cause. I think the petition should be dismissed and further litigation over the matter should be stopped." A second review strengthens this conviction.

We therefore recommend that the judgment of the district court be reversed and that plaintiff's cause of action be dismissed.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and plaintiff's cause of action dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, EX REL. WILLIAM J. CRANDALL, V.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED OCTOBER 20, 1904. No. 13,539.

1. Common Carriers: DUTIES TO SHIPPERS. A common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates, and has no right to discriminate or favor one shipper over another in rates or facilities.
2. ———: ———. But this general principle is subject to the modification that if the carrier has furnished itself with cars sufficient to carry the freight which may reasonably be expected to be offered for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has exercised due diligence in that regard, and where through causes which are not within its control it cannot supply the cars temporarily made necessary by unusual demand therefor, it is entitled to apportion the same in a fair and equitable manner among its patrons, and cannot be compelled to provide one shipper with cars to the exclusion of others.
3. Evidence. Under the facts set forth in the opinion, *held*, that no unjust discrimination has been proved, and that the relator is not entitled to the writ of mandamus prayed for.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

H. F. Rose, for plaintiff in error.

J. W. Deweese and Frank E. Bishop, contra.

LETTON, C.

This is an application for a peremptory writ of mandamus to compel the respondent to furnish and deliver to relator sufficient freight cars to enable him to ship all grain and mill products offered for shipment at the railroad station of the respondent at Firth, Nebraska, and to compel the respondent to furnish equal facilities and privileges to the relator in the matter of providing cars for the shipment of grain that are given to his competitor in business, the Farmers' Grain & Lumber Company.

William J. Crandall, the relator, now is and has been engaged, for a number of years, at the town of Firth, Lancaster county, Nebraska, in operating a mill and elevator, and of buying, selling, and shipping grain and mill products. A few years ago The Farmers' Grain & Lumber Company was organized by a number of farmers residing in that locality for the purpose of dealing in grain, and ever since this corporation began business sharp competition has existed between the respective grain dealers. Both of these parties occupy elevators situated upon the line of railroad of the respondent. It appears that in the early part of 1903 a shortage of cars existed on the lines of the respondent, and that it was compelled to apportion the cars available at that time between the grain shippers operating upon its lines of railroad, and it further appears that during this time the respondent had furnished cars in equal numbers to the rival grain dealers at Firth for the shipping of grain, upon the theory that, as a grain dealer, Crandall was entitled to an equal number of cars with the Farmers' Grain & Lumber Company, and, in

addition thereto, as a miller, he was entitled to whatever cars he could use and the railroad could furnish for the purpose of shipping his mill products; but that, since the mill products were for the most part destined to southern points, foreign cars were furnished him specially for such shipments. Under this arrangement, Mr. Crandall, from the 1st of December, 1902, to the 12th of February, 1903, had been furnished in all 102 cars, while the Farmers' Grain & Lumber Company had been furnished 47. After the 12th of February, 1903, the railroad agent at Firth, Nebraska, was instructed by C. B. Rogers, the division superintendent, that after that date the railroad company would furnish Mr. Crandall cars for flour, bran and straight car loads of corn meal as mill products, and then divide the remainder of the available cars evenly between Crandall and the Farmers' Grain & Lumber Company, and that under this ruling mixed car loads of corn meal, chop, cracked corn and sack corn would be counted at their capacity as cars loaded with grain.

It would seem that the moving cause of this order was the fact that a complaint had been made by the Farmers' Grain & Lumber Company to the railroad company that Crandall was obtaining more than his share of cars by reason of his shipping chop and cracked corn as mill products, when they ought of right to be counted as grain in the division of cars, and thus that the Farmers' Grain & Lumber Company was being unduly discriminated against in the apportionment of cars furnished. Following the making of this order, whenever Crandall shipped a car load of chop or of mixed chop and sack corn or oats, the agent at Firth furnished a like capacity of cars to the Farmers' Grain & Lumber Company for the shipment of grain, and out of this order and the action of the agent of the railway company in accordance therewith this controversy takes its rise.

It is apparent from the whole testimony that the officers of the railroad company endeavored to fairly and equitably apportion cars for the shipment of grain between these

contending parties. The determination of the question at issue depends almost wholly upon whether the article of commerce which is termed "coarse meal" or "chop" by Mr. Crandall, and is denominated "cracked corn" by the respondent and the Farmers' Grain & Lumber Company, should be considered as grain for the purpose of the apportionment of cars or should be classed as a mill product. If this article is handled and dealt in by grain dealers and elevator proprietors, and is not known under the custom and usages of the trade as a mill product or meal, then the Farmers' Grain & Lumber Company would be entitled, under the rule adopted by the respondent, which seems to be fair and reasonable, to an equal capacity of freight cars for shipment of grain to those used by Mr. Crandall in the shipment of this product; whereas, if this article falls properly and legitimately under the head of mill products, and is to be considered as a manufactured article, Crandall would be entitled to such cars as the railroad could furnish him to use in his milling business, including the shipment of this product, and, in addition thereto, with as many cars for grain shipments as were furnished to his competitor. A sample of this product taken from a sack in a car loaded by Mr. Crandall was in evidence in the district court, and is attached to the bill of exceptions in this case. A number of witnesses engaged in the elevator and grain dealing business testified that this article was what is known in the trade as "cracked corn"; that it is manufactured simply by crushing the corn between rollers, and is not cleaned or bolted in any manner, the resulting product being the same as that produced by the ordinary farmers' feed mill; while Crandall testifies that it is properly known as "coarse corn meal," though admitting that it is so produced. It seems also that in the southwestern tariff sheet a higher rate is charged for corn chop than for corn, and that on respondent's system "chop" is classified as a separate item. It is therefore contended by Crandall that this product is not properly shipped as grain but as a mill product.

Should the "chop," "cracked corn" or "coarse meal," as it is variously termed, be regarded in the distribution of cars as a grain or as a mill product? This question is not free from doubt. It is shown that a number of elevators in this state which do not do a milling business have had a demand from their customers for cracked corn for feeding purposes, and that to meet this demand they have installed roller machinery for the purpose of cracking the corn, and that the article thus manufactured is handled and sold as other corn by grain dealers. On the other hand, it is shown that Mr. Crandall has installed expensive machinery at his mill for the purpose of manufacturing corn meal. But it is also shown that in the manufacture of corn meal for culinary purposes the corn is first kilndried, then cracked or ground between rollers, and afterwards bolted, and that in the manufacture by him of this "coarse meal" or "cracked corn" the same rollers are used, but they are set farther apart so as not to crush the grain so finely; that the corn is not kilndried and the product is not bolted. The corn is merely passed between the rollers and from there loaded into the car. After examining the sample attached to the bill of exceptions and considering the evidence in the case, we are convinced that this substance properly belongs under the head of "cracked corn" or "chop," and is not in the ordinary acceptance of the term "meal"; and we are further convinced from the testimony that under the usages of the trade the article is properly handled by grain dealers as well as millers. Taking this view of the facts proved we are of the opinion that the distribution of cars as made by the respondent was not unfairly discriminative against the relator, but that, in view of all the circumstances, he has no reason to complain upon that ground.

The record shows that considerable ill feeling exists between some of the members of the Farmers' Grain & Lumber Company and Mr. Crandall, and that certain charges and complaints had been made to the railway company that Crandall had been shipping grain under

the guise of mill products by covering part of the contents of the car and thereby obtaining more than his share of cars. We are convinced, however, that these charges are not warranted by the evidence and that Crandall was honest and sincere in his opinion that as a miller he was entitled to all the cars the railroad could furnish for his use in shipping all kinds of mill products, including therein "cracked corn," and that as a grain dealer he was entitled to an equal number of cars with his competitor, excluding cars used for "cracked corn," "chop," etc. We are further convinced that no intention on the part of the respondent's agents or officers to discriminate unfairly against Mr. Crandall has been shown, and that they have been placed in the difficult position of trying to do business with two active and jealous competitors in such a manner as to remain upon good terms with both, a task almost beyond human power.

"How happy could" they "be with either,
Were t'other dear charmer away!"

The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities and that such duties of common carriers are enforceable by mandamus. With this proposition we agree. Since the briefs in this case were filed, the case of *State v. Chicago, B. & Q. R. Co.*, 71 Neb. 593, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may in the usual course of events be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may

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only occur in any given locality temporarily, or at long intervals of time. It appears that ordinarily the respondent has cars enough to meet the usual requirements of shippers, but that, owing to the long coal strike in the east, conditions had been abnormal, and the railroad company had at this time been unable to have returned to its line a large number of its cars which had been sent to points upon other railroads, and that it had found it necessary to impose an extra charge in the nature of a per diem for cars which were retained by other lines for more than 30 days, with the purpose of procuring an expeditious return of the cars. That owing to this scarcity it was impossible to furnish at this time all the cars necessary for use, not only by the relator, but by all other grain shippers along its lines in this state. Under this state of facts, the modifying principle above quoted applies, and if no unjust discrimination appears, no shipper has the right to complain because he has not been able to obtain carriage for all the goods which he may desire transported.

We are of the opinion that no failure of duty or unjust discrimination has been shown upon the part of respondent, and that the judgment of the district court should be affirmed.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM A. CAMPBELL, RECEIVER, v. ED M. TRACY, RECEIVER.

FILED OCTOBER 20, 1904. No. 13,561.

Decision followed. The decision in this case is governed by the principles announced in *Campbell v. Noyes, Norman & Co.*, ante, p. 201, which is followed.

ERROR to the district court for Johnson county: JOHN S. STULL, JUDGE. *Reversed.*

L. C. Chapman and George A. Adams, for plaintiff in error.

Ed M. Tracy, pro se.

LETTON, C.

This is a proceeding in error by which it is sought to review a judgment of the district court for Johnson county by which the defendant in error was adjudged to have a lien upon the real estate of the Chamberlain Banking House, a corporation, then in the hands of the plaintiff in error as receiver. It appears that, in the settlement of the affairs of the firm of Fairall & Rubelman, a partnership, a receiver was appointed by the district court for Johnson county, and an accounting had between said partners, to which the Chamberlain Banking House was made a party; among other things the court found that there was in the hands of the Chamberlain Banking House to the credit of said firm the sum of \$292.19, and the following order was made in said case: "It is therefore ordered by the court that the defendant, the Chamberlain Banking House, pay to the receiver the sum of \$292.19 now in its hands." No further order was made in this behalf, nor was execution awarded against the bank. Afterwards, and before the payment of this amount, the Chamberlain Banking House failed, and the plaintiff in error was appointed receiver thereof. Application was made by the defendant in error, as receiver of said firm of Fairall & Rubelman, for an order declaring his claim to be a lien upon the real estate of the corporation. The district court found "that the order made in the case of Fairall & Rubelman, though informal in its terms, is and was a judgment regularly entered in this court, and constitutes a valid lien upon said premises from the date of its being rendered," and

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directed the receiver to pay the same out of the proceeds of the sale of the real estate. The principles governing this case are the same as those applied in the case of *Campbell v. Noyes, Norman & Co.*, ante, p. 201. In that case there was an order directing the Chamberlain Banking House to pay to the person named therein a specified sum of money, but there was no recital that one party shall have and recover of the other a sum certain, and that in default of payment execution shall issue. It seems clear that no execution could issue upon the order directing the payment of the money by the Chamberlain Banking House to the defendant in error, without a further order being made by the district court. The reasoning in the opinion in *Campbell v. Noyes, Norman & Co.* applies to the facts in this case and we adopt the same.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANCES A. M. EDDY ET AL., APPELLEES, V. CITY OF OMAHA
ET AL., APPELLANTS.*

FILED OCTOBER 20, 1904. No. 13,572.

1. **Judicial Sale: APPRAISAL: ESTOPPEL.** Where the amount of an apparent tax lien not included in a decree has been deducted from the appraised value of the debtor's interest by the appraisers, and the purchaser, assuming that the taxes were valid, takes advantage of the deduction thereof, he will be presumed to have agreed with the judgment debtor that he will pay the taxes so deducted, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection.

* Rehearing opinions. See post, pp. 559, 561.

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2. **Deed: RECITALS: ESTOPPEL.** Where a purchaser of lands which are subject to an apparent lien for special assessments procures the title to the premises by a conveyance which recites that they are subject to the specific lien of the special assessments, which with interest thereon the purchaser assumes and agrees to pay as a part of the consideration thereof, he will not be permitted in a court of equity to set aside the tax as invalid.
3. **Paving: NOTICE.** The provisions of a statute and ordinance requiring 30 days' notice to be given property owners to designate the material which they desire used in repaving are mandatory and jurisdictional.
4. **Pleading: WAIVER: ISSUES.** Where the charter and the ordinances of a city require notice to be given to property owners for 30 days to designate material for paving, and notice is not given for the specified time, and the city relies upon facts tending to show a waiver of the failure to give notice, it should plead the waiver in its answer, and no waiver having been pleaded the facts are outside of the issues in the case.

APPEAL from the district court for Douglas county:
IRVING F. BAXTER, JUDGE. *Judgment modified.*

C. C. Wright, W. H. Herdman and A. G. Ellick, for appellants.

H. W. Pennock and F. J. Griffin, contra.

LETTON, C.

Separate actions were begun in the district court for Douglas county by Frances A. M. Eddy and others, and Mattie D. Valentine and others, against the city of Omaha and others, for the purpose of obtaining injunctions against the collection of certain special assessments in repaving districts No. 48 and No. 67, and special improvement district No. 597, in the city of Omaha. These actions were afterwards consolidated and tried together. A decree was rendered in favor of all the plaintiffs, except John H. Evans and Lizzie B. Evans, against the defendants, canceling the repaving and curbing assessments complained of, enjoining their collection and removing the cloud upon the title of the real estate belonging to the several plain-

tiffs caused by the assessments. From this decree the plaintiffs John H. Evans and Lizzie P. Evans have appealed, and so also has the city of Omaha, defendant.

Among other things the plaintiffs allege in their petitions that the petitions to the city council for the repaving were not signed by a majority of the owners of the foot frontage on the street to be improved; that the city failed to give 30 days' notice to property owners to select the material to be used in repaving; that there were not sufficient funds in the city treasury of the city of Omaha available to pay for the repaving of the intersections of streets and alleys at the time the improvement was ordered; that the notice of the time and place of the meeting of the board of equalization for the purpose of equalizing the repaving assessment was not given or published according to law; and allege a number of other defects in the proceedings which it is not necessary to notice. The city answered, denying the invalidity of the proceedings and setting up estoppels as to some of the plaintiffs. The court found in its decree that the assessment was null and void for the four reasons alleged in the petition and stated above. In the briefs of appellant, the city of Omaha, it is conceded that the assessment in controversy was null and void, for the reason that proper and legal notice was never given of the meeting of the board of equalization which purported to equalize the assessments. For this reason it will be unnecessary for us to examine the evidence in the case, except with reference to the rights of the appellants John H. Evans and Lizzie P. Evans, whom the court found were estopped from contesting the validity of the tax; with reference to those of the plaintiff Harriet G. Pritchett, whom the appellant city of Omaha insists appeared before the board of equalization in pursuance to the defective notice, and thereby waived all defects in the form and service of notice of the sitting of the board of equalization; and with reference to those of the plaintiff, the Omaha Loan & Trust Company Savings Bank, which the appellant city of Omaha contends is estopped to question

the validity of the special assessments, by reason of the presumption that it assumed and agreed to pay the same, having received the benefit of the same by a deduction of the amount from the appraised value of the property affected at the time it purchased it at foreclosure sale.

These concessions narrow the field of inquiry. We will first consider the appeal of John H. Evans and Lizzie P. Evans. The evidence shows that they jointly procured title to lot 11, in block 4, in Summit Reserve addition to the city of Omaha, by a deed of conveyance which contained the following provision: "Subject to the state and county taxes for the year 1900, and to eight instalments for the repaving of Farnam street in improvement district No. 597, which, with interest thereon, the purchasers assume and agree to pay as a part of the consideration hereof." By these provisions the grantees bound themselves to pay the specific special assessments which were described in the deed and which are in controversy in this case.

In *Kruger v. Adams & French Harvester Co.*, 9 Neb. 526, as in the case at bar, the debt which the plaintiff assumed and agreed to pay did not constitute an actual lien upon the premises. While it was an apparent lien, still it possessed no legal force or validity. The court held, however, that if Kruger agreed with Wells, in consideration of the conveyance, to pay off the judgment of the harvester company, he could not be said to have done equity in the premises, when he came into court to enjoin the collection of the judgment out of the land, without first paying off the judgment according to his agreement. The doctrine in this case is just and equitable, it has become the settled law of this state, and it is now too late to attempt to change it. *Skinner v. Reynick*, 10 Neb. 323; *Bond v. Dolby*, 17 Neb. 491; *Koch v. Losch*, 31 Neb. 625; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 276; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb. 657; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286; *Goos v. Goos*, 57 Neb. 294; *Battelle v. McIntosh*, 62 Neb. 647; *Curtis v. Osborne*

& Co., 63 Neb. 837; *Omaha Savings Bank v. City of Omaha*, 4 Neb. (Unof.) 563; *Equitable Trust Co. v. City of Omaha*, 69 Neb. 342; *Hart v. Beardsley*, 67 Neb. 145.

There could hardly be a plainer application of this principle than in the case at bar. The purchaser obtained the benefit of the deduction from the consideration money of the amount of the eight instalments of special assessments, by reason of his agreement to pay the same. He deprived his vendor of this money upon the promise that he would pay it to the city of Omaha upon this specific special assessment. It would be manifestly inequitable to allow him to retain the money which he promised his grantors that he would pay, and at the same time allow him to come into a court of equity and ask it to relieve him from his agreement. As is said in *Equitable Trust Co. v. City of Omaha*, 69 Neb. 342: "If appellant does not propose to pay the taxes in question, what does he propose to do with the money he has withheld from the owner of the land?" The taxes were presumptively valid, and the owner of the property was at least under moral obligations to pay them. The facts in the cases cited by the appellants in their brief are clearly distinguishable from those in which the principle herein stated is laid down. By the agreement to pay the specific assessments, and by obtaining the benefit of the deduction of the amount of the same as a part of the consideration for the property, the appellees are estopped to maintain an action to set aside the apparent lien of these special assessments.

Omaha Loan & Trust Company Savings Bank:

As to the question whether the Omaha Loan & Trust Company Savings Bank is estopped to deny the validity of the tax, it appears that the property in controversy was purchased by the appellee savings bank at foreclosure sale; that upon the appraisal of the property for sale under the decree, the appraisers fixed the gross value of the same at the sum of \$8,800; that certificates of liens were obtained and liens were deducted from the gross appraisal

as follows: Regular city taxes, \$375.23; special assessments for paving in paving district No. 48, \$170.23; special assessments for curbing and guttering in said district No. 48, \$32.28; regular county taxes, \$118.02. Total liens, \$695.76, leaving the net appraisal, \$8,104.24. It appears therefore that the special assessments in controversy, amounting to \$202.51, were deducted from the amount of the appraisement. The property was sold to the plaintiff upon its bid of \$5,425. The theory upon which the savings bank, the appellee, urges that no estoppel has arisen against its right to contest the validity of the special assessments is that, since its bid was only \$441 less than two-thirds of the gross appraised value, and since it has paid the regular city and county taxes, amounting in all to \$493.25, it derived no benefit from the deduction of the special assessments, and therefore comes into court with clean hands, having done equity in the premises by paying valid taxes to a larger amount than the advantage it gained by the deduction of both special assessments and regular taxes. This contention is based upon the idea that the only advantage the appellee gained was the difference between two-thirds of the gross appraised value and the amount of its bid; but the amount of the gross appraised value has no relation to the inquiry, and cannot be taken into consideration in determining whether or not the appellee has received the benefit of the deduction. The question is, not what the appellee might bid if no liens had been deducted, but what was actually done. When, in foreclosure sales, liens are deducted from the appraisal, a purchaser who buys under such appraisal will be presumed to have assumed and agreed to pay the liens, unless something to the contrary appears in the record. There is nothing in this case to set aside the presumption. A full discussion of the question of whether an estoppel arises under such circumstances is to be found in *Omaha Savings Bank v. City of Omaha, supra*, and *Equitable Trust Co. v. City of Omaha, supra*, also in the concurring opinion of SEDGWICK, J., in *Hart v. Beardsley, supra*. We

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are of the opinion that the district court erred in finding that the appellee was not estopped to contest the validity of the special assessments, and the decree should be modified accordingly.

Harriet L. Pritchett:

As to Harriet L. Pritchett, appellee, it appears that although the notice of the meeting of the city council as a board of equalization was defective, yet she filed a protest before the board as to the repaving of Farnam street, and, so far as that street is concerned, such appearance waived the defect in the notice as to her. It is therefore necessary to consider whether or not the proceedings were otherwise regular as to her. The charter of the city provides, sec. 110: "It shall be the duty of the mayor and council to give the property owners in said district 30 days from the approval and publication of the ordinance declaring such improvement necessary, to designate by petition the material to be used in the paving of the streets." The ordinance which ordered street improvement district No. 597 repaved, which district includes the Farnam street property of appellee Pritchett, required the board of public works "to publish a notice to property owners within said street improvement district No. 597 to select the material for the pavement within their district, and to notify the council of such selection within 30 days of the publication of such notice; the hour and the day of the expiration of said 30 days to be made in said publication." In accordance with the ordinance the board of public works published the following notice: "Notice is hereby given that 30 days will be allowed you from the first day of publication of said ordinance No. 4245 within which to designate by petition to the honorable mayor and city council of the city of Omaha the material to be used in repaving said Farnam street. Said petition must be filed with the city clerk prior to 12 o'clock, noon, August 31, 1897, at which time the said 30 days will have expired." This notice was first published on August 2, 1897, and by

its terms the 30 days were to expire at noon on August 31, 1897. It is apparent therefore that the 30 days' notice by publication was not given as required by the ordinance. The provisions allowing the owners of property abutting upon any contemplated street improvement the privilege of designating the material by which the improvement is to be made are eminently just and fair. When the individual property owner is compelled to be charged with the burden of constructing street improvements for the benefit of the general public, as well as incidentally for his own benefit, it is proper and right that he should have a voice in the determination of the material to be used. It is he who bears the burden. Out of his pocket comes the money to pay for the material which is to be used. Provisions in a city charter which make it the duty of the mayor and council to give the property owners in an improvement district 30 days from the approval of the ordinance declaring such improvement necessary to designate the material to be used, and provisions in an ordinance based upon said provisions of the charter which require the publication of said notice for 30 days are mandatory, and, unless waived in some manner by the property owner to be affected, the lack of such notice will prevent the council from acquiring jurisdiction to levy a tax to pay for such improvement. *Morse v. City of Omaha*, 67 Neb. 426. In the instant case it appears that, before the expiration of the time fixed in the notice, a petition signed by the owners of a majority of the foot frontage of the property abutting on Farnam street, and designating certain material as the material to be used, was filed with the city clerk, and it is contended by the city that this waived the defect in the publication of the notice. This alleged waiver has not been pleaded in the answer. If the city relies upon the fact that the failure to give notice was waived by this action, it should have pleaded the facts in its answer. Not having done so, it cannot take advantage of the alleged waiver in its proofs. No such issue was tendered in the case. The city relied upon the sufficiency of the notice; it

was fatally defective, and proof of circumstances tending to show a waiver by some of the property owners was outside of the issues in the case and cannot be considered. The plea is of the nature of confession and avoidance, is new matter, and must be pleaded in order to be considered by the court. *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94; *Omaha Fire Ins. Co. v. Johansen*, 59 Neb. 349. We are of the opinion that by the failure to give notice to the property owners to designate material for the length of time prescribed, the council did not acquire jurisdiction to levy the special assessment for paving against the property of Harriet L. Pritchett within said district, and that therefore the decree of the district court with reference to this appellee is correct and should be affirmed.

It appears that the curbing and guttering in paving districts numbered 48 and 67 were ordered after the streets in said districts had been ordered paved. As the law stood at that time, the city council had the power to order curbing and guttering done upon streets which had been ordered paved, without any petition of the property owners being presented for that purpose. No limitation existed upon the power of the city authorities to charge the expense of such work upon the property abutting upon the improvement. For a discussion of the law as it then stood see *Orr v. City of Omaha*, 2 Neb. (Unof.) 771; *City of Omaha v. Gsantner*, 4 Neb. (Unof.) 52. The city therefore had jurisdiction to levy the special taxes for curbing and guttering in paving districts numbered 48 and 67, and such taxes were properly charged upon the abutting property.

A number of other questions are discussed in the able briefs which have been submitted, but since these considerations dispose of the matters in controversy they will not be considered. It was suggested upon the argument that the opinion of the court was desired in regard to a number of these questions, but suffice it to say that the proper function of the court is to decide causes which have actually arisen and not to anticipate other controversies.

We recommend that the cause be remanded to the district court, with directions to modify its decree so as to sustain the validity of the curbing and guttering taxes in paving districts numbered 48 and 67, and to dismiss the action as to the Omaha Loan & Trust Company Savings Bank. As to all other matters the judgment of the district court should be affirmed.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify its decree so as to sustain the validity of the curbing and guttering taxes in paving districts numbered 48 and 67, and to dismiss the action as to the Omaha Loan & Trust Company Savings Bank. As to all other matters the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on motions for rehearing, leave to amend answers, and motions to modify judgment, was filed January 5, 1905. *Judgment modified:*

LETTON, C.

Appellants have filed motions herein, relating to that part of the decree in favor of Harriet L. Pritchett, for rehearing; for leave to amend answers in this court, and that the case may be remanded with directions to permit them to amend answers below. Since appellants seem to have misunderstood the language of the opinion as to the time of publication of the notice required to be given property owners to designate the material which they desire to be used in repaving, it is perhaps advisable to state that it was not the intention of the court to hold that this notice should be published each day for 30 days. Some of the ambiguity may come from the fact that the writer adopted the language of appellants' brief, wherein it is stated:

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"It is apparent that the 30 days' notice was not given by publication as required by the ordinance." The statute and ordinance only require that the notice be published once, notifying the property owners that they must within 30 days of the publication of such notice select the material to be used. The notice in this case was published on August 2, 1897. It stated that the 30 days would expire on August 31, 1897, at noon, which was incorrect. Appellants now argue that, though the notice informed the property owners that the 30 days would expire at noon on August 31, this was a mere irregularity, because the charter, the ordinance and the notice itself informed them that they had 30 days from the publication of the notice within which to designate said material, citing *Armstrong v. Middlestadt*, 22 Neb. 711, and *Scarborough v. Myrick*, 47 Neb. 794. We are of the opinion that this argument is sound. That if, in fact, 30 days had elapsed before the council took any action upon the matter, the recital in the notice that the time would expire several days before the 30 days elapsed would be merely an irregularity, and would not prevent the council from acquiring jurisdiction. The evidence shows however that, on the first day of September, 1897, and before the expiration of 30 days from the publication of the notice, the council acted, and passed an ordinance ordering the improvement of the street by repaving with sheet asphaltum. We held in *Morse v. City of Omaha*, 67 Neb. 426, that the council was without jurisdiction to act until the expiration of the 30 days given property owners to select material, and are still of that opinion. The council, therefore, having acted before the 30 days expired, was without jurisdiction to pass the ordinance and its proceedings were void.

The appellees also filed motions to modify the judgment of this court as to the curbing and guttering assessments in paving districts numbered 48 and 67. The opinion holds correctly that the city council had power to order curbing and guttering done upon the streets which had been ordered paved, without any petition of the property owners being

presented for that purpose. It is conceded, however, that no notice of the sitting of the board of equalization held to equalize such taxes in said districts was ever given. This being so the assessment was unauthorized, and the taxes are void. The decree of the district court, therefore, as to such taxes should be affirmed.

At the hearing our attention was not called to the fact that the Omaha Loan & Trust Company Savings Bank was the owner of other property, the taxes upon which are in controversy in this suit, besides that situated in district numbered 48. The opinion therefore only relates to the property of the bank in that district, and the decree should be modified so as to provide that the action of the bank be dismissed as to its property described in district numbered 48, and that otherwise the judgment of the district court should be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the several motions of appellants herein referred to are overruled, and the judgment heretofore entered in this case is so modified as to dismiss the action of the Omaha Loan & Trust Company Savings Bank as to its property in paving district numbered 48 described in the pleadings. In all other respects the judgment of the district court is affirmed.

JUDGMENT MODIFIED.

The following opinion on second motion for rehearing was filed May 17, 1905. *Former judgment modified:*

1. **Paving: NOTICE: JURISDICTION.** Under the statute governing cities of the metropolitan class (Compiled Statutes, 1897, ch. 12a, sec. 110), property owners of a paving district must be allowed 30 days from the approval and publication of the ordinance declaring the improvement necessary in which to designate by petition the material to be used in repaving. But if a petition signed by the property owners representing a majority of taxable foot frontage, designating the material to be used, is filed, the mayor and council will not lose jurisdiction of the proposed improvement by acting upon such petition before the 30 days has expired, if no other

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petition is filed within that time from which it appears that the necessary number of property owners have within the 30 days designated another material.

2. ———: PETITION: SIGNATURE OF CORPORATION. The president of a corporation is the proper party to sign a petition for repaving on behalf of the corporation. His signature will not be held invalid as unauthorized, although the board of directors took no action thereon, if it appears from the evidence that it had for some time prior to such signing been customary for the president to sign such petitions on behalf of the corporation without express authority from the directors, and that the directors knew of this custom and consented thereto, and had reason to believe that the president had signed the petition in question, and made no objection thereto until the improvement had been entered upon, relying upon the validity of such signature to bind the corporation.
3. ———: ———: ———. The board of education of the school district of Omaha may authorize its president to sign such petition in the name of the board, and the signature of the board by its president pursuant to such authority will bind the school district.
4. ———: STREET INTERSECTIONS: ASSESSMENTS: INJUNCTION. It is the duty of the city council to provide available funds with which to pay for street intersections before ordering the improvement. But after the improvement is made and the intersections actually paid for by the city, special assessments against abutting property cannot be enjoined on the ground that this fund with which to pay for the street intersections was not available at the time the improvement was ordered.

SEDGWICK, J.

This motion for rehearing involves principally the conclusion of the former opinions in regard to the assessment against the property of the plaintiff below, Harriet E. Pritchett. In the opinions heretofore filed this assessment is held invalid because 30 days, from the approval and publication of the ordinance declaring such improvement necessary, was not allowed the property owners in which to designate by a petition the material to be used. The statute does not provide for the giving of notice other than the publication of the ordinance declaring the improvement necessary, but the ordinance enacted provided

that the board of public works should publish a notice to property owners to select the material for the pavement, and also provided that the hour and day of the expiration of the 30 days should be stated in the notice. Accordingly notice was published that the 30 days would expire on the 31st day of August, 1897, and this notice was first published on the 2d day of August, so that by its terms the notice did not allow 30 days from the publication thereof in which to make the selection of materials.

A majority of the property owners united in a petition designating the materials to be used, and after this petition was filed, and before 30 days from the publication of the notice had expired, the council acted upon the petition and designated the materials as in the petition requested. It was held in the former opinions that the action of the council was invalid because it did not allow the full 30 days for making the selection. The plaintiff Harriet E. Pritchett did not sign the petition nor take any part in making the selection of materials. It was said in the opinion that this point has been determined in the case of *Morse v. City of Omaha*, 67 Neb. 426, and that it was there held that the mayor and council were without jurisdiction to determine the materials to be used in paving until after the 30 days had expired. We think this was an error, as this precise point was not involved in the case of *Morse v. City of Omaha*, *supra*, and the question is now a new one before this court. As the plaintiff Pritchett did not unite in the petition selecting the materials, she is not, of course, estopped thereby to now contend that the petition was insufficient or that the council acted prematurely thereon. It is insisted on behalf of the city that, since a majority of the property owners united in selecting the materials, the council might act thereon as soon as the petition was filed, and that it was unnecessary to delay the full period of 30 days for any further action on the part of the property owners in regard to selecting materials. We think that this reasoning is not conclusive to the extent insisted upon by the city.

The statute provides that when the same person signs more than one petition, his signature shall be counted upon the petition last signed. The matter of the selection of materials for the paving is an important one, and a property owner might upon full investigation be dissatisfied with his first conclusion, and, although a majority had petitioned for certain materials, it would appear to be entirely competent for the property owners to change their determination at any time within 30 days. So that if a second petition had been filed within the time limited, in which some of the former petitioners should join, and which was signed by the owners of half of the foot frontage of the district, requesting a different material from the one first designated, the council would no doubt have been required to act upon this second petition. This, however, in this case was not done, and since no other petition was tendered to the council, nor any different determination made by the property owners within the 30 days, it does not appear that this plaintiff was in any way injured by the action of the city council in that regard. The presumption must be, upon this record, that a majority of the property owners desired the council to take the action that it did in determining the materials to be used. Nothing appears in the record to the contrary. We think therefore the conclusion reached in the former opinions upon this point is erroneous.

2. There were other grounds urged in the briefs of the parties for holding this assessment erroneous, which it was said in the former opinions it was not necessary to consider because of the conclusion there reached. Upon the argument before the court in this motion therefore the other grounds were discussed, and it becomes necessary for us to look into the whole record to determine whether there is any other reason for holding this assessment invalid. The questions discussed in the briefs and oral arguments mainly depend upon the sufficiency of the original petition of the property owners for the repaving in question. The statute(Compiled Statutes, 1897, ch. 12a, sec.110) provides

that: "No repaving shall be ordered except upon the petition of the owners of a majority of the taxable front feet in any improvement district." The plaintiffs objected to the genuineness and validity of many of the signatures to this petition. The trial court concluded that the petition was insufficient, and, in doing so, rejected the alleged signatures of the Omaha Savings Bank, Nebraska National Bank of Omaha, the Byron Reed Co., and the Coad Real Estate Co. The names of these corporations were signed to the petition in each instance by the president of the corporation, and represented the frontage of 463.2 feet. The contention was that it did not sufficiently appear that the president signing for the corporation was sufficiently authorized so to do. The findings of the court upon this point were: (a) "That at the time of signing the petition for repaving for and in behalf of the corporation, and for a long time prior thereto, it had been the custom and usage of the president of the corporation to sign for and on its behalf petitions for the improvement of streets by paving, or repaving, without first consulting the board of directors or without receiving special authority from them so to do. (b) That the board of directors of said corporation had knowledge of such custom and usage on the part of said president, made no protest and never objected thereto, and at all times acquiesced in such custom and usage. (c) That the board of directors at no time by resolution specially authorized the president to sign for and in behalf of the corporation the petitions for the repaving of Farnam street in district No. 597, nor was such authority conferred by the articles of incorporation or by-laws thereof." The conclusion of the court was that the signing by the presidents of the respective corporations was not authorized. In this we think the court was mistaken. Authorities are cited by the appellees which discuss the powers of corporations, but this is not a question of *ultra vires*. The corporation had power to join in this petition. The question was as to the manner of exercising that power. The statute provides that a deed of the corporation may be executed by the

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president. There can be no doubt that the president was the proper officer to sign this petition in behalf of the corporation. It was the province of the board of directors to determine whether or not he should so sign it. It is not contended that the action of the president was contrary to the wishes of the board of directors. It appears that no express authority was given him by the board of directors to sign the name of the corporation. If the board of directors knew that it had been the custom of the president to act for the corporation in regard to such petitions, and if the president in pursuance of such custom had acted upon this petition, thereby leading all parties interested to suppose that the corporation had authorized the action, and if the board had acquiesced in such action until the time that this suit was begun, other parties in the meantime having acted upon it supposing that it was the desire of the corporation to be bound upon this petition, there can be no doubt that the board of directors, and the corporation which they represented, would be estopped thereafter to deny the validity of the corporate signature so executed by the president; and if the corporation itself would at the time of the commencement of this action be bound by the signature of the president, there can, of course, be no reason for allowing a third party to object to the sufficiency of the signature upon grounds that would not be available to the corporation itself.

It is said that the evidence is not sufficient to establish the custom or usage relied upon, at least as to some of the corporations named. Special reference is made to the evidence of Mr. Manderson, president of the Omaha Savings Bank, and of Mr. Yates, president of the Nebraska National Bank. Mr. Yates was questioned and testified as follows:

Q. And when you signed this you were president of the bank and one of the directors?

A. I was president and one of the directors.

Q. Did you consult with the other directors in reference to this pavement in signing this petition?

A. According to my recollection I did.

Q. What, if anything, Mr. Yates, did the other directors of the bank say to you in reference to this paving and you signing for the bank?

A. I can't recall exactly what was said, but it was the judgment of the directors that the pavement was desirable.

Q. And they so informed you?

A. And I was so informed.

There is no evidence that the directors ever repudiated the action of the president. They acquiesced therein, and there can be no doubt that at the time this action was begun the corporation was estopped to deny the power of the president to bind the corporation by his signature. It was not necessary to show a general custom or usage in that regard. Without going into a detailed discussion of the evidence as to the other corporations named, it is sufficient to say that it is equally conclusive. It is contended that the views above announced are inconsistent with the rule established in *Morse v. City of Omaha*, 67 Neb. 426. We do not so regard it. In that case it appeared affirmatively that the directors had no knowledge that any action had been taken purporting to authorize the improvement on behalf of the corporation. It did not appear that the circumstances were such that they ought to have taken notice that the president had signed for the corporation. The trial court found that the signature of the corporation by its president was unauthorized, and that finding was not set aside by this court. If 463.2 feet be added to the foot frontage found by the trial court to be properly represented upon the petition, there is a clear majority required by the statute. Unless some of the questioned property which was counted by the trial court as being properly represented upon the petition should be excluded, the petition was sufficient.

3. The property of the school district was included in the findings of the court as properly represented upon the petition. The signature upon the petition was "Board

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of Education, by Jonathan Edwards, Prest.," and it represented a frontage of 215.5 feet. The title to the property in question was vested in the school district of Omaha. The board of education has control of the property of the school district. It is authorized to determine the question as to whether the paving would, or would not, be a benefit to the school district, and no other authority is authorized so to do. It appears from the record that, by a resolution of the board of directors, the president of the board was directed to sign the petition in question, and there can be no doubt that the president of the board in signing the petition signed for the school district of Omaha, and intended thereby to bind the property of the district, and that the board which directed him so to do was fully authorized to have so directed. We think there is no doubt that the trial court was right in counting this property as included in the petition.

It is confessed in the brief that the trial court was also right in counting the property of the Imperial Loan and Trust Company which amounted to 57 feet frontage. One-half of the taxable frontage of this improvement was 5,798.55 feet. The amount of the frontage represented upon the petition and not in dispute was 5,108.57 feet; add to this the foot frontage represented by the four corporations above named, the board of education, and Imperial Loan & Trust Company, and the amount represented upon the petition (5,844.27 feet) constituted the foot frontage required by the statute. It is not necessary therefore to examine as to the validity of other signatures discussed in the briefs.

4. It is contended that the city council was without jurisdiction to order the improvement in question because, as it is alleged, there were not sufficient funds available to pay for the street and alley intersections. It appears from the stipulation that the cost of paving the intersections was found to be \$5,392.88, and that at the time the improvement was ordered the cash balance in the "paving fund" was \$6,016.98. At the general election held three

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months before the improvement was ordered, bonds for this purpose were authorized in the amount of \$25,000 pursuant to the provisions of the statute. These bonds were afterwards issued and sold, and the money had been placed in the paving fund before it was necessary to pay for the street intersections. Under this condition of the record it is not necessary to determine when the funds necessary to pay for these intersections might be said to be "available." Nor is it necessary to determine whether it was the duty of the city council to make such provisions that cash would actually be in the paving fund with which to pay for these intersections before the improvement was ordered.

In *Morse v. City of Omaha*, 67 Neb. 426, after disposing of the questions necessary to a determination of the case, the writer of the opinion proceeded to decide other questions, to a discussion of which it was said counsel had devoted much of their briefs and oral argument. In determining whether it was necessary that there should be a specific declaration in the ordinance that the improvement was necessary, the writer said:

"In the provision for a petition of the abutting owners, the legislature has spoken clearly and in mandatory tones. So also with the provision regarding the status of the intersection fund. There is no difficulty under the authorities and this statute to hold these provisions jurisdictional."

It appears from the further discussion at that point that this statement quoted was purely dictum. We do not feel bound by it. The provision that there must be "funds available" for the intersections when the improvement is ordered appears to be for the benefit and protection of the city itself and the general taxpayers therein. It may be that the council could be prevented from ordering such improvements as these without "funds available" for the street intersections. If it should be thought that ordering the improvement was not justifiable while the paving fund was in the condition shown by this record, which is by

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no means clear, we have no hesitation in concluding that after the improvement had been made and the intersections paid for by the city, the property owner could not avoid the payment of the assessment against his property upon the ground that the council exceeded its authority in ordering the improvement without first providing the cash with which to pay for the intersections.

It follows that the assessment against the property of the plaintiff Pritchett was valid, and that the decree of the district court should also be modified so as to sustain that assessment.

With this exception the former opinions herein are adhered to.

JUDGMENTS MODIFIED.

WILLIAM W. WHEATLEY, TREASURER, ET AL., APPELLEES, V.
CHAMBERLAIN BANKING HOUSE ET AL., APPELLANTS.

FILED OCTOBER 20, 1904. No. 13,607.

APPEAL from the district court for Johnson county:
JOHN S. STULL, JUDGE. *Reversed.*

H. F. Rose, W. B. Comstock and Ed M. Tracy, for appellants.

Jay C. Moore and Hugh La Master, contra.

LETTON, C.

The issues and facts in this case are substantially the same as those in the case of the *National Bank of Commerce of Kansas City v. Chamberlain*, ante, p. 469, and the proper disposition of this case is controlled by the decision in that. The judgment of the district court upon the issues in this proceeding should be reversed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the lower court for further proceedings in accordance with the opinion in *National Bank of Commerce of Kansas City v. Chamberlain*.

REVERSED.

EMMA SNELL V. LEWIS RUE.

FILED OCTOBER 20, 1904. No. 13,628.

Statute of Limitations. The provisions of sections 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments.

ERROR to the district court for Nemaha county: ALBERT H. BABCOCK, JUDGE. *Reversed*.

J. S. McCarty and H. A. Lambert, for plaintiff in error.

S. P. Davidson, *contra*.

LETTON, C.

The question presented in this case is whether or not the provisions of the statute of limitations of this state apply to an action upon a dormant domestic judgment. The plaintiff in error contends that the provisions of the statute do not apply to an action brought in this state upon such a judgment, while on the other hand the defendant in error contends that the provisions of section 16 of the code, which provide "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued," apply. The judgment sued upon was rendered in 1897, and was dormant at the time this action was commenced. The argument of the plaintiff in error substantially is that, since an execution may issue upon the judgment for a period of five years

after its rendition, it could not have been the intention of the legislature to bar the bringing of an action upon the same claim while it was still an enforceable judgment, and that, since the code was enacted as a whole, the sections which provide that a judgment shall not be a lien upon real estate after the expiration of five years from the rendition thereof unless an execution is issued, and which provide for revivor of dormant judgments, and the sections of the statute of limitations which provide that an action may be brought upon foreign judgments within five years, are to be construed together, and make it plain and obvious that the legislature never intended that the statute of limitations should apply to domestic judgments. On the other hand, defendant in error insists that the provisions of section 16 are broad and sweeping in their terms and embrace actions of every nature other than those specifically mentioned.

In examining this question we have been able to receive but little light from adjudications in other states, the statutes of limitations of the several states being so different in their provisions that the decisions in each state are largely determined and governed by the local statute. The provisions of the code of the state of Ohio with reference to the lien of judgments, the time at which they became dormant, and the limitation of actions upon the same, were the same as those of this state are now, in 1864, when the case of *Tyler's Executors v. Winslow*, 15 Ohio St. 364, was decided by the supreme court of that state, except that our statute limits the time for bringing an action upon a foreign judgment to five years, while no mention was made in the Ohio statute of actions upon foreign judgments. In that case it was contended that a domestic judgment was a "specialty" and became dormant within 15 years, as provided by the statute. The court held, however, that a domestic judgment was not a specialty. It was further contended that the four years' limitation upon the bringing of all actions not specifically enumerated in the statute applied. In this connection,

however, the Ohio court, in the case above mentioned, say: "A domestic judgment is not embraced in the limitation of four years provided in the last clause of the section, for the obvious reason, among others, that by a contemporaneous act, taking effect on the same day with this, it was provided that such judgments should not become dormant until after five years. This court, however, are of opinion, that the judgments of the courts of this state are not subject to any of the provisions of the section under consideration. By this section, actions are limited to the specific period of each, 'after the *cause* of such action shall have *accrued*' or, 'after such *right* of action shall have *accrued*.' We think that a fair construction of this language, according to its ordinary import, excludes domestic judgments; and was intended, by the legislature, to apply to claims that accrue by maturity, or arise by the happening of events that give a right of action, as usually understood. It can hardly be supposed that, without any specific provision to that effect, it was understood that the merging of a cause or right of action, as ordinarily understood, in a judgment, was the accruing of a cause of action. Surely the object of adjudicating a claim or 'cause of action,' and the rendition of judgment thereon is not to mature, or 'accrue,' a right of action; but to terminate a cause of action in a judgment finally determining the rights of the parties, and to secure the remedies that follow a judgment. Undoubtedly a judgment is a cause or right of action of the highest nature, and that such action accrues when the judgment is rendered; but its objects and purposes are ordinarily so foreign to the mere maturity or accruing of a right of action that it would be deemed singular to speak of the rendition of a judgment, merging an adjudicated claim, as the accruing of a cause of action; and especially would this be so, in relation to a domestic judgment, where the only purpose of obtaining it may be the remedies that follow."

This case was decided after the adoption of the statutory provisions which are construed in the opinion by the ter-

ritory of Nebraska, and this court, therefore, is not bound by the well known principle of statutory construction to follow the decision. It seems to us, however, that the view taken by the Ohio court is in consonance with right principles. In this state a judgment does not lose its vital force by the expiration of five years after its rendition without the issuance of an execution thereupon. It is not dead, but sleepeth. This court has held that a sale of real estate made upon a dormant judgment cannot be attacked collaterally after confirmation, *Gillespie v. Switzer*, 43 Neb. 772, and that the payment of a dormant judgment cannot be recovered back. *Gerecke v. Campbell*, 24 Neb. 306. In some states, at the expiration of the statutory period, a judgment becomes actually dead and is possessed of no force or potency for any purpose whatsoever, but such is not the case in Nebraska.

An action may be brought in this state upon a foreign judgment within five years after its rendition; and it hardly seems probable that the legislature would debar its citizens from the same rights which it grants a creditor in a foreign state. Further, since by the issuance of an execution within five years a judgment may be kept alive in this state, or if dormant it may be revived, we would have the anomalous situation of a judgment being enforceable by execution, or revivable by proceedings for that purpose, and not enforceable by action after four years from its rendition. We are not forgetful of the language used in certain opinions rendered by this court, *State v. School district*, 30 Neb. 520, 528; *Beall v. McMenemy*, 63 Neb. 70, wherein it is said in general terms that by section 16 of the code the legislature intended to cover every form of action; such language, however, must be taken as applying to the specific case which the court was then considering, and under the view taken by the Ohio court, this language is not applicable to an action upon a domestic judgment. Statutes of limitations are intended as statutes of repose, but where the right of enforcement of a judgment by execution still exists after the bar which it is

claimed the statute interposes to an action has taken effect, the bar is of no avail so far as preventing the collection of the debt is concerned. Hence the statute fails of its purpose as a statute of repose. We cannot believe that the legislature intended to fix such a short time within which an action upon a domestic judgment might be maintained, and at the same time leave the judgment open to enforcement by execution.

In this state a judgment plaintiff, who has suffered his judgment to become dormant by failure to issue an execution upon the same within five years, may prosecute proceedings in revivor. We see no reason why he may not be permitted to enforce the same by action if the debt has not been paid. This has been the general rule in regard to dormant judgments in most jurisdictions. See 2 Freeman, Judgments (4th ed.), sec. 432, p. 751.

The right to prosecute revivor proceedings and the right to maintain an action upon the judgment are merely cumulative remedies. The plaintiff may have either or both, as he sees fit. We hold, therefore, that an action may be brought upon a dormant judgment and that the provisions of the statute of limitations do not apply to actions upon domestic judgments.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED. .

IN THE MATTER OF THE APPLICATION OF FRED H. KRUG
FOR A LIQUOR LICENSE.

FILED NOVEMBER 2, 1904. No. 13,433.

1. **New Trial.** A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from an order of a licensing board granting or refusing a license to sell intoxicating liquors. *Bennett v. Otto*, 68 Neb. 652.
2. **Liquor License.** Under the provisions of section 1, chapter 50, Compiled Statutes, 1903, the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship, and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understanding that such person or corporation will select a person to conduct the business under the license. *In re Tierney*, 71 Neb. 704.
3. ———. The board of fire and police commissioners of a city of the metropolitan class is without authority to grant a license to sell intoxicating liquors where the undisputed evidence discloses that the applicant has no interest in the license applied for, and that the same is for the exclusive use and benefit of a third party who is to be the unqualified owner and proprietor of the business of dealing in and selling intoxicating liquors for the sale of which the license is granted.
4. ———. A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out such trust, and not delegate it entirely to others.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

Charles Ogden and Hamilton & Maxwell, for applicant.

Cooper & Dunn, contra.

HOLCOMB, C. J.

This is a proceeding in error, prosecuted by the remonstrant, to have the record reviewed and secure the

reversal of an order of the district court dismissing his appeal taken to that court from an order of the board of fire and police commissioners of the city of Omaha granting a license to sell intoxicating liquors on the application of the person named therein as licensee.

1. It is urged by defendant in error that no motion for a new trial, as by law required, was filed in this case, and therefore no questions are properly presented for review. It is held in *Bennett v. Otto*, 68 Neb. 652, that a motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from an order of a license board granting or refusing a license to sell intoxicating liquors.

2. The undisputed evidence in this case discloses that the applicant to whom the license was granted by the licensing board was not the real party in interest. It is, by the evidence submitted in support of the objections filed to the granting of the license applied for, rendered manifest that the business of dealing in intoxicating liquors for which the license was granted was to be conducted under the unqualified control, ownership and proprietorship of a third party, for whose sole and exclusive use and benefit the license was being obtained. The only possible qualification of absolute ownership of the business of owning and dealing in intoxicating liquors for the sale of which the license was granted is some evidence to the effect that the owner of the saloon would be required to conduct an orderly place of business. In principle, the case at bar comes altogether within the rule announced in *In re Tierney*, 71 Neb. 704. It is there held:

"Under the provisions of section 1, chapter 50, Compiled Statutes, 1903 (Annotated Statutes, 7150), the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship; and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understand-

ing that such person or corporation will select a person to conduct the business under the license."

The evidence in the case at bar is positive and unequivocal to the effect that there existed no relationship whatever of principal and agent between the licensee and the owner and proprietor of the business for whose benefit the license was being obtained. The license fee was not paid by the applicant but by the owner of the business, who thus sought to obtain authority to engage for himself and in his own behalf in the sale of intoxicating liquors. In speaking of the provisions of the law regulating the sale of intoxicating liquors, this court has heretofore said:

"An examination of the above provisions of law can scarcely fail to satisfy anyone that the people of this state have reserved to themselves, acting through the several local boards, county and city, the right to discriminate between the different applicants for liquor license, to license such applicants as upon the principles laid down should be deemed worthy, and refuse those who, upon the application of the same principles, should be held to be unworthy. A licensee, under the above provisions, accepts from the authorities a personal trust and assumes personal duties and responsibilities quite repugnant to the idea of his selling his license along with his stock on hand, furniture and fixtures. Under statutes much less discriminating than ours, it has been held by the courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York, and other states, that a liquor license is a personal trust or permit, and is incapable of assignment. In some cases it has been held that the privilege of selling intoxicating liquors was of so personal a nature that it could not be exercised through an agent." *State v. Lydick*, 11 Neb. 366. In *Watkins v. Grieser*, 11 Okla. 302, 66 Pac. 332, it is held:

"A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out

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such trust, and not delegate it entirely to others whose character may not be such as the law requires of the licensee." See also *Hall v. Hart*, 52 Neb. 4; *Scmple v. Flynn*, 10 Atl. (N. J.) 177.

Upon the authority of the cases cited, the judgments and orders of the district court and of the board of fire and police commissioners must be reversed and the license granted canceled, which is accordingly done.

JUDGMENT ACCORDINGLY.

JOHN MCNEAL V. LIZZIE HUNTER.

FILED NOVEMBER 2, 1904. No. 13,609.

1. **Bastardy: TRIAL: PLEA.** Where on a trial in a bastardy proceeding, the defendant goes to trial upon the sole and only issue of his guilt as charged in the complaint, and on the theory that he has pleaded not guilty, and the case is so submitted to the jury, the fact that no formal arraignment and plea thereto is entered of record is an irregularity which at most is error without prejudice.
2. **Waiver.** The right to have the complaint read to him and to be allowed to plead thereto may be waived by the defendant, and he will be held to have waived the same where a trial is had as though such plea had been entered.
3. **New Trial.** A new trial on the ground of newly discovered evidence will not be granted where the proposed evidence appears to be hearsay and incompetent.
4. **—**: A defendant will not be allowed a new trial on the ground of newly discovered evidence where it appears that such evidence was known at the beginning of the trial, and no seasonable effort was put forth to procure such evidence at the trial or to secure a postponement of the trial before a final submission of the case to the jury, and until such evidence could be secured.
5. **Evidence examined, and found to be sufficient to sustain the verdict of the jury.**

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

W. W. Wood, for plaintiff in error.

C. Patterson, *contra*.

HOLCOMB, C. J.

On a trial had to the court and a jury, a verdict was rendered finding the defendant guilty on a complaint charging him with being the father of a bastard child delivered by the complainant, Lizzie Hunter. After the overruling of a motion for a new trial, the defendant was by the court duly adjudged to be the reputed father of the said child, and ordered to stand charged with its maintenance in the sum of \$300, to be paid in instalments as in the judgment provided, also to pay the costs of the action, and to be confined in the jail of Sheridan county until the judgment was complied with or bond given as required by law for the performance of such judgment. The defendant prosecutes error.

1. It is assigned as error that the court ordered the issue in the case to be tried to a jury, and the trial thereof had on the complaint, without the defendant being arraigned and given an opportunity to plead to the complaint. The record does not affirmatively show a formal arraignment on the complaint and a plea thereto by the defendant. In the instructions of the court, the jury were told that the defendant had been duly arraigned upon such charge, and had entered a plea of not guilty, and that this plea of not guilty put in issue the truth of said charge. It is altogether clear from an inspection of the record that the only issue submitted to the jury was that of the guilt of the defendant of the act charged in the complaint; and that the case proceeded to a trial and judgment upon the theory, and was so treated by both parties, that this, and only this, issue was raised by the pleadings. It is equally manifest that the defendant during the whole of the trial was vigorously denying his guilt and protesting his innocence; that he submitted evidence

in support thereof, and upon that issue the jury found against him. We cannot possibly see how the defendant was prejudiced, even though no formal arraignment and plea were entered of record. His right in this respect to be arraigned and to be allowed to plead to the complaint, like all others in a civil action, may be waived. The defendant could, if he desired, elect to appear and resist the charge in the complaint, and it was not incumbent upon him to file any written plea. 5 Cyc. 665, par. 3. For the same reason, he could waive the formal reading of the complaint and the entering on the record of a plea of not guilty. It is hardly to be doubted that in this case the defendant, by going to trial and trying his case as though the issue had been regularly made up, waived any right he might have regarding a formal arraignment and plea thereto. Conceding, therefore, the irregularity complained of, it at most is only error without prejudice, and regarding which the judgment ought not to be reversed.

2. Error is also sought to be predicated on the ruling of the court denying the defendant a new trial on the ground of newly discovered evidence. There are two reasons, we think, why this contention cannot be sustained. In the first place, much of the proposed evidence was hearsay and incompetent, being alleged statements of third parties not shown to have been made in the presence and hearing of the complainant. Eliminating the incompetent evidence, the remainder was in no wise contradictory of the testimony of the complainant; the object being to offer evidence as tending to prove that the complainant had made a statement as to who was the father of her illegitimate child, inconsistent with the charge made against the defendant. In the second place, the proposed evidence was known to the defendant or his attorney before the final submission of the case on the first trial, and there is an entire absence of evidence showing due diligence to procure it in time to be submitted at the original trial, or to secure a brief postponement until the witness could be procured. The affidavit of the attorney for the de-

defendant recites that he learned of such evidence on the morning of the day set for the trial of the cause; that he caused a subpoena to issue, but that the witness did not appear in obedience to the subpoena till the close of the trial; and that during the progress of the trial and before the defendant rested his case, he submitted to the presiding judge what he had been informed the absent witness would swear to, and was informed that the evidence as detailed could not be allowed, whereupon the case was submitted to the jury. While this may be a very informal way of presenting an application for a postponement of the hearing until the witness could be procured, the legal effect, if it has any, is an acquiescence by the defendant in the ruling of the trial judge, with no exceptions taken thereto and regarding which error would not lie. But if this informal presentation of the matter during the trial is to be disregarded, then it is equally clear that the defendant did not act with reasonable diligence when he failed to procure the attendance of the absent witness, and failed to make an application for a postponement of the trial till her attendance could be procured before entering upon a trial of the case, and before the final submission of the cause to the jury. A party knowing of the existence of material evidence in his behalf before the trial, or before his cause is finally submitted, cannot be permitted to submit his case to the jury on the evidence at his command, and thereafter, if the cause goes against him, obtain a new trial on the ground of the discovery of such evidence and his failure to produce it at the original trial. He must be prompt and diligent, and in this action it was the duty of the defendant to make his application for further time at the time he learned what the absent witness would testify to, and before the cause then about to be tried was finally submitted for a verdict and judgment.

3. Lastly, it is argued that the evidence is not sufficient to support the verdict of the jury. The evidence preserved by the bill of exceptions has been examined, and, while

it is not as strong and convincing as might be desired in order that any doubt as to its sufficiency might be dissipated, yet we are not prepared to say that it is not legally sufficient to support the jury's finding. There is competent evidence to support the verdict. The evidence, it is true, is more or less conflicting. The jury saw and heard the witnesses. It was for them to weigh and consider the testimony of each and all of them. "The paternity of the child being the fact to be determined by the jury the credibility of the witnesses, the opportunities for intercourse, the duration of the period of gestation, and the fact that a bastard child has been born are all matters which may be considered by them in arriving at their verdict." 5 Cyc. 667, par. 8. A finding upon such evidence, under a well recognized rule, cannot rightfully be disturbed by this court. We cannot say the verdict is clearly and manifestly wrong and unsupported by sufficient evidence. The action is essentially civil in its nature, and a preponderance of the evidence is all that is required. We find no prejudicial error in the record, and it follows that the judgment of the district court should remain as announced and rendered.

AFFIRMED.

HUGH MCCAFFREY, APPELLEE, v. CITY OF OMAHA ET AL.,
APPELLANTS.

FILED NOVEMBER 2, 1904. No. 13,787.

1. **Cities: STREET IMPROVEMENTS.** Where the wearing surface of a paved street in a city of the metropolitan class has become so rotten and decayed as to be unfit for use, and in a work for the improvement of such street it is proposed and required that all the material composing the wearing surface of the entire portion of the paved street shall be removed and a new material of the same or of a different kind replaced or relaid thereon, even though on the same concrete base, such proposed work constitutes a "repaving" of the street as distinguished from "re-

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pairing," as those words are used in the charter act of such cities, applicable to and regulating the manner and method of improving such streets.

2. **Repaving:** PETITION. In the case at bar, it is *held* that the contemplated improvement of the street is essentially and in substance a "repaving" thereof as distinguished from "repairing," and can be engaged in by the city authorities only upon a petition of the abutting property owners, when it is proposed to tax back to the abutting property the cost of such improvement.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

C. C. Wright and W. H. Herdman, for appellants.

Frank H. Gaines, contra.

HOLCOMB, C. J.

This is a suit for an injunction, brought by the plaintiff, appellee here, for the purpose of restraining the appellants, the mayor and council of the city of Omaha, from awarding a contract for certain work for the improvement of a street in one of the paving districts of the city of Omaha, and from taxing back to the abutting property owners the cost of such proposed improvement. To the petition filed in the trial court the defendants interposed a demurrer, which upon consideration by the court was overruled, and an order entered perpetually enjoining the defendants from proceeding further under the proposed contract to make such improvement in the manner as therein contemplated, and from taxing the cost thereof to the abutting lot owners. That portion of the petition material to a proper understanding of the case alleges that "said 16th street from the south line of Douglas street to the south line of Izard street was many years ago paved with asphalt, and that the guaranty period of such pavement has long since expired, and that the pavement is in a very defective and rotten condition, said pavement being full of large holes, and the entire asphalt surface thereof being

decayed and rotten and practically unfit for use, and that the base of said pavement is in many places much worn, and that the surface of such pavement is in such a condition that it is impracticable to repair the same"; that there was "prepared a proposal for repairing the asphalt pavement on 16th street between the south lines of Douglas and Izard streets with sheet asphalt, * * * and for maintaining such pavement in a condition of continuous repair each year for a period of five consecutive years. * * * Said proposal and form of specifications were duly submitted to the city council, and by said city council duly approved on April 26, 1904, and approved by the mayor of Omaha May 2, 1904. That, in accordance with said specifications and proposal, * * * bids * * * were duly opened, and it was found that the Barber Asphalt Paving Company had made the lowest bid upon such repairs, to wit, for first year, \$27,985; second year, \$498.05; third year, \$498.05; fourth year, \$498.05; and fifth year, \$498.05; and that, * * * unless restrained by the order of this court, the city of Omaha, through its city council and its board of public works, will enter into a contract with said Barber Asphalt Paving Company in accordance with said proposal. That, under and by virtue of the terms of said contract, the said city of Omaha intends to, and will, unless restrained by the order of this court, proceed to assess and levy against this plaintiff, and the property owned by this plaintiff, and all the property abutting on said 16th street between the south lines of Douglas and Izard streets, the cost of said repair and maintenance, claiming and pretending to act under and by virtue of the provisions of the charter of said city of Omaha, to wit, chapter 12a, Compiled Statutes of the state of Nebraska, 1903 (Annotated Statutes, 7450-7688)." The proposal and specifications were attached to and made a part of the petition. But two propositions are argued by counsel appearing in the case, and presented for consideration; the first being, does the proposed street improvement, assuming it to be repair work, come within the

scope and purview of section 6, article IX of the constitution, which provides that "The legislature may vest the corporate authorities of cities * * * with power to make local improvements by special assessment, or by special taxation of property benefited," the right to make such proposed improvement and levy a special tax therefor being derived solely from these provisions? The second is, if it be determined that the proposed improvement, while under the form and name of a repairing of the street, is essentially and in substance a repaving of it, then it is conceded that the right to make such improvement and levy a special tax on abutting property owners for the cost thereof is prohibited by the city charter, which confers such power upon the mayor and city council only through a petition of the abutting property owners, and that such petition is wanting in the present case.

We are content to rest the decision heretofore announced in this case on the latter proposition. The work which it is proposed to engage in, as alleged in the petition and the truth of which is admitted by the demurrer, is, we think, in substance and essentially a repaving of the street, although designated in the proposal and specifications under which the contract was about to be awarded as a work of repair and maintenance. The record in this case in all its material aspects presents questions very similar to those considered and determined in *Robertson v. City of Omaha*, 55 Neb. 718. The two cases are quite analogous. The rule announced in that case is in point here. In the case cited, it is declared in the syllabus that:

"Where, in case a street paved with wooden blocks laid on a concrete base, such blocks have become worthless and are entirely removed in pursuance of a contract entered into with the city, and replaced with vitrified brick laid on the old base, such new improvement is not an 'ordinary repair' within the meaning of the statute, but is a repavement of the street, and to pay the cost thereof a special assessment may be made against the abutting real estate." In the opinion it is said:

"The final argument presented is that the work done by Murphy under the contract was not a repavement of Leavenworth street, but was merely a repair of an existing pavement, and, therefore, the city was liable therefor, and it possessed no authority to impose a special assessment against the real estate of plaintiffs to pay the same. This contention is grounded upon the single fact that the concrete foundation of the former cedar block pavement was utilized in making the improvement in controversy. The entire wearing surface of wood of the old pavement was removed and replaced with vitrified brick, and the mere using of the old base of concrete did not constitute the work an 'ordinary repair' within the meaning, and contemplation, of the statute. The assessment assailed was made for the repavement of the street."

But it is argued the contract in this case is to be let for repairing and keeping in repair, and that the essential elements of a repaving do not exist; that the original grade and plan of the improvement are preserved, and that the repairs are to be of the same material which distinguishes this case from the one cited, the holding in which, it is said, was influenced by the fact that a new and different character of material for the surface was to be laid. The quality or character of the material used in putting on the new pavement or surface does not, to our mind, essentially change the nature of the work which is being done. What is in fact contemplated, what is the nature of the work to be done, must determine whether it is properly a work of "repair" as used in the charter act, or whether it is "repaving" within the meaning of the word as therein found. Repaving, the act declares, can be done only upon a petition of the abutting property owners, when the cost thereof is to be taxed back to the property benefited. In this case, it is admitted that the entire asphalt surface had become decayed and rotten and practically unfit for use, and that it is impracticable to repair the same by patching. The allegations of the petition in this respect are emphasized by the conceded facts

as to the requirement of the specifications and the cost of the proposed improvement contained in the proposal on which the contemplated contract is based. While the work is denominated a repairing of the street for the first year, and its maintenance for each of the other of the five years, yet the cost of the work to be done the first year, as compared with the mere nominal cost of keeping it in repair thereafter, is almost conclusive of the fact that, as alleged in the petition, the entire asphalt surface is to be relaid, and the concrete base repaired wherever necessary to bring it back to its original level. What is contemplated and required to be done is to entirely replace upon the concrete base a stratum of new asphalt, forming the surface of the street as it is used for public travel. It is not, we think, required that the whole of the material used in the paving in the first instance shall be relaid, or a change made in the original plan or grade, in order to constitute the work a repaving within the meaning of that word as used in the charter act of cities of the metropolitan class. To repave is to relay, not necessarily the whole of the pavement as originally constructed, but it is to pave again, cover over with suitable material, or resurface the street, when the surface material as originally laid has become destroyed, so that it is no longer usable. There can, we think, be no distinction in sound reason or principle for saying that, where the surface of the street is laid with brick upon the same concrete base, in place of wooden blocks which have been worn until they are useless, that this is a repaving; but that, if on a like base, when all of the old surfacing, whether it be blocks, brick, or asphalt, is removed, and new material used in replacing and relaying such surface of the same kind as the old, this would constitute a repair only, whether ordinary or otherwise, as distinguished from repaving, within the meaning of that word as used in the statute. If repaving as used in the act means only a new pavement constructed after a regrade or change of plans, and not until the destruction of the old, and every part of it, then, indeed, would there be

but little repaving done, and the statutory provisions relating thereto would be of but little practical use. The legislature, we apprehend, used the word in a different sense, and provided for a plan of repaving with the view of protecting the interests of property owners, and inhibiting a work of such importance and involving such great expenditure to be met by taxing the abutting property, except upon a petition of the owners of such property. The act, we think, contemplates that, when the original paving has become so unfitted for use or destroyed to such an extent as to be useless, so that the whole of the paved portion of the street is required to be relaid or resurfaced with some suitable new material, whether the same kind as, or different from, that originally used, and although on the same concrete base, the work shall be regarded and treated as a repaving, and that such improvement can be made only subject to the provisions relating thereto.

From an examination of the entire record, we are of the opinion that the proposed improvement in the present instance is, in substance and essentially, a repaving of the street within the meaning of the word as used in the charter act, and, as such, can be undertaken only upon a petition by the property owners, where it is proposed as it is here to tax the cost of such improvement to the real estate abutting on the street as thus improved. It is for these reasons that the judgment of the district court is

AFFIRMED.

LOUIS RUZICKA, APPELLEE, V. MATT HOTOVY, APPELLANT.

FILED NOVEMBER 2, 1904. No. 13,458.

1. **Statute of Frauds: MEMORANDUM OF CONTRACT OF SALE.** A memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description,

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if the description is otherwise specific, and the land intended can be identified from the description with the aid of parol evidence.

2. ———: ———. Our statute of frauds does not require all the terms of the contract to be stated in the written memorandum thereof; if the time for consummation of the contract by executing the deed and paying the consideration is not stated, nor whether securities are to be given for deferred payments, if any, these matters may be shown by parol evidence.
3. **Specific Performance: DECREE.** A provision in a decree of specific performance in favor of a plaintiff that plaintiff shall secure deferred payments by mortgage upon the premises is not prejudicial to defendant, and, plaintiff not having appealed therefrom, it will not be disturbed.
4. **Appeal: DEPOSIT.** When a decree in equity requires the plaintiff to deposit money or securities in court as conditions precedent to enforcing the decree against the defendant, and defendant, within the time limited for making such deposit, appeals from said decree and supersedes the same, the time allowed for making the deposit is thereby extended until a like time after the decree becomes again enforceable.
5. **Decree: INTEREST.** It being contemplated in the contract that interest on deferred payments should run from the completion of the contract by the execution of the conveyance, the decree is sufficiently definite upon that point if it specifies when the deed is to be made, and the notes and mortgage for the deferred payments executed. It will be implied that interest is to run from the execution of the notes.

APPEAL from the district court for Butler county:
SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

Arthur J. Evans and L. S. Hastings, for appellant.

Matt Miller, contra.

SEDGWICK, J.

Decree was entered in the court below in favor of this plaintiff for the specific performance of a contract as follows:

“DWIGHT, NEB., 7-11-1901.

“I the undersigned Louis Ruzicka tender one hundred

dollars on $\frac{1}{4}$ Sec. 7, T. 13, R. 4 and have purchased same for \$5500.00 on 5 years, 4 years at \$900.00 and 5 years \$1200.00 at 5%.
M. HOTOVY."

The principal question contested in the court below and mainly relied upon here is the sufficiency of this memorandum under the statute of frauds. Issue was tendered in the answer as to the execution of the memorandum by Mr. Hotovy, and there were allegations that it was procured by fraud; but the findings of the trial court upon these questions are so manifestly supported by the evidence, and the only findings that the evidence would warrant, that it seems unnecessary to discuss them here.

1. It is first contended that the memorandum is too indefinite to be enforced, because it does not specify which quarter of the section was intended, nor whether the range in which the land lies is east or west of the meridian. The petition alleges that the southeast quarter of the section was intended, and that the land contracted for lies in range 4 east of the 6th principal meridian. The evidence shows that Mr. Hotovy at that time owned the southeast quarter of section 7 in township 13 north of range 4 east of the 6th principal meridian; that this land was then being occupied and used by his tenant; that he had no other land that could possibly have been intended; and that both parties understood these facts and contracted with reference to this farm. This renders the memorandum sufficiently definite in this respect to comply with the statute of frauds. The case of *Ballou v. Sherwood*, 32 Neb. 666, is precisely in point, and disposes of this objection. *Adams v. Thompson*, 28 Neb. 53.

2. The second objection to the memorandum is more serious. The defendant contends that the memorandum to comply with the statute of frauds must state the consideration and the terms and conditions of payment. The second paragraph of the syllabus in *Nelson v. Shelby Mfg. & I. Co.*, 38 Am. St. Rep. 116 (96 Ala. 515), is:

"A contract for the sale of land is not sufficient to

satisfy the requirements of the statute of frauds if the precise terms of payment cannot be ascertained therefrom without resorting to parol evidence."

This appears to be the rule applied by a large majority of the courts of this country, but we do not consider it to be the law in this state.

In *Morrison v. Dailey*, 6 S. W. (Tex.) 426, the memorandum was: "Lancaster, June 28, 1887. Received from H. Morrison forty dollars on my place, known as the 'James Perry Tract of Land,' which tract I have sold to him for forty-five hundred dollars, part cash, and the balance to bear interest at ten per cent. per annum until paid. Mrs. N. B. Dailey,"—and the court, in discussing the fact that there was no mention in the memorandum of the time of payment of the balance of the purchase price said:

"The weight of authority seems to be in favor of the rule that all the material terms of the contract should appear in the writing (citing cases). But the contrary rule is not without authority to support it (citing authorities which hold a different rule). The courts which held the affirmative of the question seem to base their conclusion upon the ground that, by the use of the word 'agreement,' or of the word 'contract,' the statute meant all stipulations agreed to by the parties. On the other hand, it is considered by some of the authorities that the object of the statute, so far as lands are concerned, was to abrogate parol titles, and that this was sufficiently accomplished by a memorandum of the promise to convey the land, to be signed by the vendor, without requiring the other terms of the agreement to be stated."

The statute of Alabama, under which *Nelson v. Shelby Mfg. & I. Co.*, *supra*, was decided, expressly provided that the consideration must be stated in the memorandum. Our statute contains no such provision. It provides, not that the contract itself must be in writing, but that "some note or memorandum thereof" must be.

In New York, under a statute which required that the consideration of the memorandum be expressed in the

writing, it seems to have been held that the terms of payment must be found therein. The law of 1863 (p. 802, ch. 464) having omitted the provision requiring the consideration of the promise to be expressed in the writing, it was held that the writing was sufficient without stating the consideration. *Finkelstein v. Kessler*, 84 N. Y. Supp. 266. The memorandum in question, which was signed by Mr. Hotovy, recites that Mr. Ruzicka has purchased the land in question; that the agreed price is \$5,500; that all payments are to be made within five years; that \$100 has been paid; that for four years the payments are to be at \$900 a year, and the fifth year payment is to be \$1,200, and that the rate of interest on the deferred payments is to be 5 per cent. It is therefore lacking in no particulars, unless it be in respect that it does not specify when the remainder of the consideration is to be paid, nor when the transfer is to be made, nor whether the deferred payments are to be secured. These matters may be proved by parol evidence under our statute. Ordinarily, parties to such transactions do not draft their own conveyances, and, as such conveyances must be executed with certain prescribed formalities, it is to be presumed that the parties intended, and the contract contemplated, that the conveyance should be executed and the transaction consummated at once; that is, as soon as it would be reasonably convenient for the parties to do so.

\$100 of the purchase price was advanced as earnest money. The times for payments amounting to \$4,800 of the \$5,500 purchase price were fixed by the memorandum. As to the time of paying the remaining \$600 nothing is said in the memorandum. The contract was not void for this omission, as above shown. If no time of payment of the consideration is expressed in a contract of purchase, payment is due upon delivery.

3. It is insisted that the finding that the contract was that the deferred payments should be secured by mortgage on the land is not supported by the evidence. Without such contract, the vendor must rely upon the personal

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responsibility of the purchaser. The defendant is not prejudiced by this part of the decree of the trial court, and the plaintiff has not appealed therefrom.

4. The plaintiff had deposited in court the \$600 for the cash payment, and the court by its decree required a further deposit to be made by him, and the execution and deposit of securities within a time fixed by the court in the decree. After the defendant had given his bond for appeal, which superseded the decree of the trial court, the plaintiff withdrew the deposit which he had made with the clerk of the court in obedience to the decree, and has failed to comply with the terms of the decree in the other respects mentioned. It is insisted that the plaintiff has "thereby abandoned all right accruing to him under the decree." This contention cannot be sustained. The defendant, by taking his appeal and filing his supersedeas bond, has suspended the operation of the decree. The time allowed plaintiff to comply with the terms of the decree has thereby been extended. When the decree becomes again enforceable in the district court, the plaintiff will have the time allowed in the decree in which to comply with these terms.

5. The decree does not prescribe in express terms when the interest upon the deferred payments shall begin. Of course, the contract contemplated that the purchaser should pay interest from the time his purchase was completed and he became entitled to possession of the premises. This sufficiently appears from the decree in which the plaintiff is required to execute and deposit his notes for these payments, bearing interest at five per cent. This cannot be construed otherwise than that interest will run from the date of the notes. At that time, by the terms of the decree, the plaintiff is to have possession of the premises.

The decree of the district court is

AFFIRMED.

CHARLES O. LOBECK V. STATE OF NEBRASKA, EX REL. NEBRASKA BITULITHIC COMPANY, ET AL.

FILED NOVEMBER 2, 1904. No. 13,950.

1. **CITIES: CLAIMS.** A partial estimate made by the city engineer of the city of Omaha on a paving contract, and reported by him to the board of public works and the city council for approval and allowance, is a claim against the city within the meaning of section 33 of the city charter.
2. **Appeal.** By complying with the provisions of that section, a taxpayer may appeal from the order of the city council approving and allowing such a claim to the district court.
3. ———: **EFFECT.** When an appeal is perfected it suspends the order of the council and during its pendency the comptroller is not required to deliver the warrant for the payment of the estimate to the claimant.
4. ———: **MANDAMUS.** During the pendency of such appeal, mandamus will not lie to compel the delivery of the warrant.

ERROR to the district court for Douglas county: **WILLIAM A. REDICK, JUDGE.** *Reversed with directions.*

C. C. Wright, W. H. Herdman and A. G. Ellick, for plaintiff in error.

W. J. Connell, contra.

BARNES, J.

The Nebraska Bitulithic Company, in the spring of 1904, entered into a contract with the city of Omaha to repair its asphalt pavements. The company proceeded with the work, and partially completed the repairs. By the terms of the contract, it was provided that payments should be made on estimates of the city engineer from time to time, and in such amounts as might be found due by such estimates. One estimate was made and the amount due thereunder paid, but when the second estimate was reported by the engineer to the board of public works, and by that body to the mayor and city council, Charles E. Fanning,

a citizen and taxpayer of the city, notified the council that the work had not been done according to the contract, and that he would appeal from any allowance made on said estimate. The board of public works, the city council and the mayor approved the estimate, and made an allowance of \$3,991, the amount due thereunder, and the comptroller and the mayor signed a warrant therefor. Fanning thereupon gave notice and took the necessary steps to perfect an appeal from such approval and allowance to the district court, under the provisions of section 33 of the city charter. The comptroller refused to deliver the warrant to the company and the First National Bank of Omaha, its assignee, until the time for an appeal had expired. Thereupon the plaintiffs commenced this action in mandamus to compel the comptroller to deliver the warrant, notwithstanding the attempted appeal. The trial in the district court resulted in an allowance of a peremptory writ of mandamus, commanding the comptroller to deliver the warrant to the relators. From that judgment he prosecutes error, and thus presents for our consideration the question whether the right of appeal to the district court in such a case is granted by the terms of the city charter. The section in question reads as follows:

"Before any claim against the city, except officers' salaries and interest on the public debt, is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged and that the amount therein charged and claimed is due and unpaid, allowing all just credits, and the city comptroller and his deputy shall have authority to administer oaths and affirmations in all matters required by this section. All claims against the city or water board must be filed with the city comptroller. And when the claim of any person against the city is disallowed, in whole or in part, by the city council or water board, such person may appeal from the decision

of the said city council or water board to the district court of the same county by causing a written notice to be served upon the city comptroller of said city, within twenty (20) days after making such decision, and executing a bond to such city, with sufficient surety, to be approved by the city comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the city comptroller of said city to notify the claimant, his agent or attorney, in writing, of the fact within five (5) days after such disallowance. * * * Any taxpayer may likewise appeal from the allowance of any claim against the city or water board by serving a like notice on the city comptroller within twenty days and giving a bond similar to that provided for in this section."

The relators contend that the section above quoted has no application to cases like the one at bar. In other words, that the estimate on which the allowance was made was not a claim within the meaning of said section. We find ourselves unable to assent to this proposition. The law is broad and sweeping in its terms, and was evidently intended to include all claims of every kind and nature requiring for their payment the withdrawal of money from the city treasury, except, of course, officers' salaries, interest on the public debt, and claims for torts, which are presented and prosecuted in a different manner. Its purpose was to safeguard the public funds, and by an easy and inexpensive method enable a taxpayer to prevent fraud and extravagance in conducting the business of the city. It seems clear that it was intended to apply to claims due on contract work, as well as all other demands against the municipality, and should receive such judicial interpretation and construction as will render it effectual for that purpose. We are unable to distinguish any difference between a claim made by a contractor on an estimate of the city engineer for a partial compliance with his contract, and any other contract claim against the city. Sec-

tion 101a of the city charter, which defines the powers and duties of the board of public works, among other things, provides:

"It shall be the duty of such board of public works and it shall have power to make contracts on behalf of the city for the performance of all such works and the erection of such improvements as may be ordered by the mayor and council, but only with the approval of the mayor and council. * * * It shall also be the duty of said board to approve the estimates of the city engineer, which may be made from time to time, of the public work, as the same may progress; to accept any work or improvement made when the same shall be fully completed according to contract, subject, however, to the approval of the mayor and council."

With reference to the duties of the city engineer, it is provided in section 93 of the charter, as follows:

"He shall make all necessary surveys, plans, specifications and estimates, of all public works of the city and their maintenance and repairs. The city engineer shall make all temporary and final estimates of public works under contract, and report the same to the board of public works, who shall submit the same to the mayor and council with their recommendation."

Under the provisions of section 94 of the charter, it is also made the duty of the city engineer to inspect public work, and, if found to be properly done, to accept the same and forthwith report his acceptance to the board of public works, and, when the contract so provides, he may accept such work in sections. But in every case he must report his acceptance to the board of public works, which, in turn, reports the same to the mayor and city council for final approval and acceptance. So it is clear that no payment can be made for any public work until the claim therefor has been allowed by the city council, and approved by the mayor, and the amount thus found thereby due is ordered paid. The amount due on an estimate is as much a claim as an amount due on a contract without an esti-

mate. In *State v. District Court*, 90 Minn. 457, 97 N. W. 132, a case very much like the one at bar, and where the same contention that the amount of an estimate was not a claim was made, the court said:

"It is urged that relator has presented no claim to the city council for their action, that it never submitted to the jurisdiction of that body, and is now being forced into court without its consent. It appears from the record that, after the relator had partly performed its contract, some officer representing it requested the proper city authorities to make an estimate of the amount of work performed. The request was complied with and estimate made, which was thereafter presented to the council for their action. It was allowed by the council, and relator demanded of the city clerk the issuance of an order on the city treasurer for the amount. That relator occupied the position of a claimant with a claim against the city, there can be no serious doubt. It asserted a claim under the contract for the amount claimed to be due, and the city council duly allowed it. If anything further is essential to constitute a claim within the meaning of the charter, we are unable to point it out."

It is contended, however, that, because the relator did not verify the estimate in question by affidavit, stating "that the items therein alleged are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount therein charged and claimed is due and unpaid, allowing all just debts and credits," the claim was not included within the provisions of section 33, above quoted. We do not so understand it. The allowance of the estimate by the city council, and the approval of the mayor, was required before a warrant could be drawn for its payment, and it is our opinion that such estimate, when presented, should have been accompanied by the verification of the relator, as set forth above. The mere fact that it had been the custom to disregard this charter provision when such estimates were presented does not

change the nature of the indebtedness, or render it any less a claim against the city within the meaning of the law. The council, by acting on the estimate without requiring the affidavit above mentioned, could not deprive a taxpayer of his right of appeal. It is urged that it would be a calamity to the city of Omaha to hold that an appeal could be taken from the allowance of a partial estimate under a contract for paving; that it would make rival contractors, in the place of the city engineer and the board of public works, the arbitrators of the proper execution and completion of public work done under contract with the city. We think that counsel is unnecessarily alarmed about this matter. The provisions of the city charter require certain formalities to be observed by those having claims against the city, precedent to the issuance of a warrant in payment of the same. Persons entering into contracts with the city are bound to know this fact, and take it into consideration. The charter provisions become a part of such contracts, and the remedy there pointed out to secure payment must be pursued. The fact that a strict compliance with the law would work a hardship in some cases does not authorize the courts to nullify the provisions of the charter; we must declare the law as we find it. If to comply with the provisions of the charter is difficult or onerous, or results in injury to the city and individuals, the remedy is with the legislature, and not with the courts. Relief should be sought by amendment, and not in nullification.

It is therefore our opinion that the estimate in question was a claim within the meaning of section 33 of the city charter, and that the taxpayer had a right to appeal from the approval and allowance thereof by the city council to the district court. It appears that an appeal was duly perfected. The effect of the appeal was to at least suspend the order of the board during its pendency, and while the case was pending and undisposed of in the district court mandamus would not lie to compel the delivery of the warrant.

In re Estate of Parker.

For these reasons, the judgment of the district court is reversed and the cause remanded, with directions to dismiss the action.

REVERSED.

IN THE MATTER OF THE ESTATE OF WILLIAM FREDERIC
PARKER, DECEASED.

FILED NOVEMBER 2, 1904. No. 13,596.

Estate of Decedent: SALE: REVIEW. In the conduct of proceedings for the sale of real estate for the payment of debts of a deceased person, the principal duty of a district court is to conserve the estate, and its orders and judgments to that end ought rarely to be disturbed, and never unless they appear to have been mistakenly made, or disclose an abuse of discretion unjustly injurious to a party in interest.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Gaines, Kelby, Storey & Martin and I. R. Andrews, for appellant.

Charles A. Goss and J. W. Hamilton, contra.

AMES, C.

Executors of the will of William Frederic Parker, deceased, obtained from the district court a license for the sale of certain real property belonging to the estate of the testator for the payment of his debts. Sales of a large number of tracts were accordingly made and reported to the court. As a part of their report, the executors recited that there were several tracts that were bid off at the sale for sums, in their opinion, below their value, among them being five lots in an addition to the city of Omaha for which the appellant Isaac R. Andrews was bidder, and as to such tracts they recommended that the bids be not accepted, but a resale ordered. A like representation was also made

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by a minor son of the testator by a guardian *ad litem*. Andrews bid at the sale an aggregate sum of \$35 for the five lots, and, on the coming in of the report, another person offered, in case of a resale, to bid \$50 for them. In view of the fact that other tracts were required to be advertised, so that the resale of these lots would occasion no appreciable additional expense, the court granted the application of the executors and minor, and Andrews appealed from the order to that effect to this court.

The principal duty of the district court in such cases is to conserve the estate of the decedent, and, in our opinion, its orders and judgments to that end ought rarely to be disturbed, and never unless they appear to have been mistakenly made, or disclose an abuse of discretion unjustly injurious to a party in interest. Such a condition of affairs is not disclosed by the record, and we recommend that the order appealed from be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the order appealed from be

AFFIRMED.

WILLIAM MCGINLEY V. ANNA M. WIRTHELE.

FILED NOVEMBER 2, 1904. No. 13,635.

Replevin: ANSWER. When a defendant in replevin qualifies a general denial in his answer by pleading specially that the title to the property in dispute is in him, he waives the technical defense that he was not in possession of it at the beginning of the action.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

W. F. Moran, for plaintiff in error.

W. W. Wilson, contra.

AMES, C.

The plaintiff in error, McGinley, claims to have purchased some chattel property of August Wirthele on the 24th day of February, 1901, and to have sold it on the same day, and delivered it to his vendee. On the 12th day of March following, this action in replevin for a recovery of the property was begun against him by the defendant in error, the wife of the vendor, her husband in the meantime having absconded. The return of the officer recited that the property in dispute could not be taken under the writ, and the action proceeded as one for damages. Issues were made up and tried to the court without a jury, the result being a judgment for the plaintiff.

The defendant below prosecutes error, contending, first, that the judgment ought to be reversed because the gist of the action of replevin is the unlawful detention of the property, and that at the time this suit was begun, and for two weeks previously, the chattels in dispute were not, and had not been, actually or constructively in his possession. This defense is, however, in a measure technical, and one which a defendant may waive, if he chooses so to do, and we think that in this case he did so. Instead of relying upon a general denial, as he might have done if he had seen fit, he expressly qualified that defense by pleading specially that he had purchased the property for value and in good faith of the husband, and that the plaintiff, by her conduct in permitting the latter to take and retain possession of the same and represent himself to be the owner and entitled to dispose of it, was estopped to allege title in herself.

By this answer the plaintiff in error tendered a distinct issue of title, and so made the question of possession immaterial. It does not lie in his mouth to say that the court has tried, at his instance, a question of which, because of circumstances within his knowledge and existing at the time of the beginning of the suit, it had not jurisdiction. The case falls precisely within the rule announced

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by this court in *Flynn v. Jordan*, 17 Neb. 518, which was also an action in replevin in which the issues were, in this respect, exactly similar to those in the case at bar.

A second contention of the plaintiff in error is that the evidence is insufficient to establish ownership in the wife, who was plaintiff below. But this is an action at law, in which the findings of fact have the same rank and importance as the verdict of a jury, and an examination of the record fails to convince us that the conclusions of the trial judge were, in the language of the decisions, "clearly" or "manifestly" wrong. And, besides, although we do not wish to be understood as holding that a plea of estoppel is in all cases so clearly inconsistent with a denial of title as to preclude the latter defense, yet in this case the pleading gave the alleged estoppel such exclusive prominence as to amount very nearly, if not quite, to an admission of actual ownership in the plaintiff, which could be defeated only by the matter *in pais*. It cannot be, and we do not understand is attempted to be, seriously contended that the defense of estoppel was made out. Whatever may have been the conduct of the plaintiff with respect to the property, it is not shown, or attempted so to be, that it came to the knowledge of the defendant or influenced him in any way at or before the time he made his alleged purchase.

For these reasons, we recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

WILLIAM H. BUTTERFIELD ET AL. V. COMMERCIAL CATTLE
COMPANY OF NEBRASKA.

FILED NOVEMBER 2, 1904. No. 13,555.

Lease: STATUTE OF FRAUDS. A written memorandum, signed by the party making the lease for a leasehold contract of more than one year, is competent evidence of a valid contract, when such written offer has been accepted by the lessor.

ERROR to the district court for Pierce county: **JOHN F. BOYD, JUDGE.** *Reversed with directions.*

M. D. Tyler and Douglas Cones, for plaintiffs in error.

Benjamin Lindsay and Barnhart & Free, contra.

OLDHAM, C.

This was a suit in forcible entry and detainer. There was no dispute as to the questions of fact involved, and at the close of the testimony the court directed a verdict of guilty and rendered judgment upon the verdict; and to reverse this judgment defendant brings error to this court.

The undisputed facts in the record are that for several years the defendant in the court below had occupied a large tract of land owned by the plaintiff cattle company in Pierce county; that, prior to April 20, 1902, defendant had occupied these premises, known as "The Ranch," under a written lease for three years, which expired on that date; that Mr. E. de La Chappelle was the manager of the plaintiff cattle company, and resided in Ottawa, Illinois. That Mr. B. W. Woolverton, a real estate agent who resided in Pierce county, had exercised a limited agency over plaintiff's lands, and had collected the rents from defendant for several years prior to the controversy. The year before the expiration of the last written lease, defendant, desiring to procure a further lease of the premises, applied to Mr. Woolverton for terms on which his lease might either

be renewed or another one entered into. Mr. Woolverton communicated this information by letter to the manager of the company, and, in answer to his letter, received the following communication :

"OTTAWA, ILL., April 30th, 1901.

"B. W. Woolverton, Pierce, Nebraska—DEAR SIR: I have tried to formulate a plan for the best result to be obtained from the ranch. I have carefully noted the report that you sent to me and thank you for the same. To-day, if you can induce Mr. Butterfield to take a three years lease at \$850 per annum, reserving the right of selling the parcels not connected with the main body of land, I will accept these terms. As far as the repairs are concerned, the clause adopted by both parties in the old lease ought to be maintained. I wish you can succeed in obtaining Mr. Butterfield's consent to the above conditions and remain,

"Yours truly,

E. DE LA CHAPPELLE,

"Manager for Commercial Cattle Company."

When Mr. Woolverton received this communication, he notified Mr. Butterfield of such fact, and showed him the letter, and prepared a new lease, in duplicate, of the premises for three years, including all the terms specified in the letter from plaintiff's manager. Defendant signed each of the duplicate copies of this lease, retained one, and Mr. Woolverton mailed the other to plaintiff's manager, who retained his copy of the duplicate lease for about two weeks, and subsequently declined to sign the same, and served notice on the defendant of the termination of his tenancy, and at the expiration of the notice, defendant having declined to surrender possession, plaintiff instituted the instant case.

It is urged in support of the judgment of the trial court that the lease having been signed by the lessee alone is invalid under the statute of frauds. If defendant's right stood alone upon the written lease which he executed, and which plaintiff subsequently refused to sign, we think this

contention would be well founded. Section 5, chapter 32, of the Compiled Statutes, 1903 (Annotated Statutes, 5954), provides as follows: "Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." In short, this statute of frauds, which is a statute of evidence, requires that a valid contract of leasehold for more than one year can only be established by a written contract or some note or memorandum thereof in writing, signed by the party who makes the lease. But the question arises, whether the letter from plaintiff's manager is not a memorandum in writing signed by the duly authorized agent of the plaintiff, by which this leasehold contract may be proved. This court has held in numerous decisions that a memorandum may take the form of a written offer signed by the party who is to make the sale or the lease of the land, and when this offer is accepted by the other party there is a valid lease or sale, as the case may be. *Gartrell v. Stafford*, 12 Neb. 545; *Robinson v. Cheney*, 17 Neb. 673; *Gardels v. Kloke*, 36 Neb. 493.

We think there can be little doubt that under the direction of the letter of plaintiff's manager, before set out, Mr. Woolverton would have been fully authorized to have prepared and signed this lease on behalf of plaintiff, and that, if he had done so, plaintiff would have been bound by the contract. But, in any event, when the lease was prepared, it was signed by defendant, and his signature to the lease ratified the terms of the memorandum which were embodied in the contract. The last clause in the letter before set out is: "I wish you (Woolverton) can succeed in obtaining Mr. Butterfield's consent to the above conditions." In accordance with this direction, Woolverton did obtain Butterfield's consent to every condition set forth in the memorandum; and by this act we think a valid agreement was consummated, and that this agreement is

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properly evidenced by a memorandum in writing signed by the party by whom the lease was made.

We therefore conclude that the learned trial judge was in error in directing a verdict of guilty, and, as there is no disputed fact in the record, we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the trial court to dismiss plaintiff's petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the trial court to dismiss plaintiff's petition.

REVERSED.

FAYETTE I. FOSS, APPELLEE, v. JAMES W. DAWES, APPELLANT.*

FILED NOVEMBER 2, 1904. No. 13,610.

1. Contribution for payment of partnership debts cannot be enforced until there is a final settlement of all the affairs of the partnership.
2. Evidence examined, and held insufficient to show a final settlement of partnership affairs.

APPEAL from the district court for Saline county:
GEORGE W. STUBBS, JUDGE. *Reversed with directions.*

Robert Ryan, for appellant.

Fayette I. Foss, *W. G. Hastings* and *R. D. Brown*,
contra.

OLDHAM, C.

In November, 1879, James W. Dawes and Fayette I. Foss entered into a partnership, and, as such, engaged in

* Rehearing denied. See opinion, p. 611, *post*.

the "law and loan" business at Crete, Nebraska. On May 12, 1890, plaintiff Foss began an action in the district court for Saline county for a dissolution of the partnership and a winding up of its affairs. From the record before us it appears that a receiver was appointed, and that the matter of the indebtedness of the partners to the partnership was referred to Judge Broady, who, as referee, reported that the defendant was indebted to the partnership in the sum of \$25,912.20, and plaintiff was indebted to the partnership in the sum of \$20,782.27. This report was filed on May 19, 1892, and was confirmed by the court on June 1, 1892. Claims in excess of \$60,000 were filed with the receiver by the creditors of the partnership. This original suit is still pending. On January 17, 1900, the plaintiff filed a supplemental petition, in which he sets forth numerous items which he alleges he has paid for and on behalf of the partnership, and asks judgment against the defendant for contribution. There was an answer, denying liability on the items, a plea of former adjudication and the statute of limitations. A trial was had that resulted in a judgment against the defendant, from which he appeals to this court.

The main contention presented in this court is that "no action at law or in equity lies in favor of one partner against another, founded upon partnership transactions, until there has been a settlement of all indebtedness of the partnership with its creditors"; or, in other words, one partner cannot have contribution from the other before final settlement of all partnership business. This proposition is obviously sound, for the amount which the one partner is entitled to, if anything, cannot be known until the partnership affairs are settled. Hence, the relation of debtor and creditor between partners does not arise until the affairs of the partnership are wound up and a balance struck. Such balance is to be struck after all partnership affairs are settled, and not while they are being wound up. *Gleason v. White*, 34 Cal. 258; *Simrall v. O'Bannons*, 7 B. Mon. (Ky.) 608; *Lower v. Denton*,

9 Wis. *268; *Austin v. Vaughn*, 14 La. Ann. 43; *Oglesby v. Thompson*, 59 Ohio St. 60; *Ashley v. Williams*, 17 Ore. 441; *Hall v. Clagett*, 48 Md. 223; *Slater, Myers & Co. v. Arnett*, 81 Va. 432; *Stanberry v. Cattell*, 55 Ia. 617; *Hill v. Beach*, 12 N. J. Eq. 31. This is conceded by the appellee. In his brief, on page 5, he says: "But contribution for payment of partnership debts is not enforced till final settlement." The record in this case does not show a final settlement. There was a receiver of this partnership estate with whom were filed numerous claims against the partnership, which were allowed. A number of these claims are included among the items of the supplemental petition, but, on the other hand, there are many—amounting to over \$15,000—which are not so included. There is nothing in the pleadings or in the evidence that purports to show that this hearing was on or after final settlement, but, on the contrary, the evidence shows it was not. The plaintiff, on cross-examination, testified as follows:

Q. What was the amount of the claims filed against the estate? How much was the aggregate amount?

A. I cannot tell you exactly; the record shows.

Q. You do not know how much is unpaid?

A. I do not.

Q. Do you know how many creditors there were?

A. I cannot tell you that. I know that the most of them have been paid and there is a little that is not yet wiped out, but I cannot tell how much.

In *Oglesby v. Thompson*, *supra*, the court said:

"It is always the duty of a court in a suit for an account to state it, if possible, from the evidence offered; but, if this is not possible according to the rules by which issues of fact are determined, it can do but one thing—dismiss the action for an account. An ascertainment of the state of the accounts is a necessary predicate to the rendition of any judgment in favor of the plaintiff."

In the judgment appealed from is the finding: "Court finds that all partnership debts are paid or barred by the statute of limitations." This finding is based upon noth-

ing, neither pleading nor evidence, and it is difficult to understand upon what theory it was interpolated in the record. If, as a matter of law, the learned trial court concluded that the claims were barred by reason of the lapse of time from the filing thereof, it was wrong. These claims, when allowed by the court, are, in effect, judgments against the partnership assets, and the statute of limitations does not *begin* to run against them so long as the suit into which they were brought is pending.

There are some other questions presented by the record, but, as the one discussed disposes of the case, it would serve no useful purpose to investigate them now.

We therefore recommend that the judgment of the district court be reversed, with directions to dismiss plaintiff's supplemental petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, with directions to dismiss plaintiff's supplemental petition.

REVERSED.

The following opinion on motion for rehearing was filed February 22, 1905. *Motion denied:*

PER CURIAM: It is ordered and adjudged that the order heretofore entered directing the dismissal of the plaintiff's supplemental petition be vacated and set aside, and that the judgment be reversed, and the cause be, and hereby is, remanded to the district court for further proceedings not inconsistent with the opinion heretofore filed in this case.

It is further ordered that the motion for a rehearing be, and the same hereby is, overruled.

MOTION DENIED.

IN RE MINNIE GREASER ET AL.

FILED NOVEMBER 2, 1904. No. 13,620.

Habeas Corpus: APPEAL. The judgment of a district court in a proceeding in habeas corpus will not be reviewed by this court on appeal.

APPEAL from the district court for Colfax county:
JAMES A. GRIMISON, JUDGE. *Dismissed.*

George W. Wertz, for relator.

W. I. Allen and *E. T. Hodsdon*, *contra.*

OLDHAM, C.

This was a proceeding in habeas corpus in the district court for Colfax county, Nebraska. There was a judgment for the relators in the court below, which respondents seek to have reviewed by this court on appeal. No motion was filed for a new trial in the court below, nor was a petition in error filed in this court. This leaves but one question to determine, and that is as to the form of the procedure under which this court will review the judgment of a district court in habeas corpus. This question was before us in the case of *In re Van Seier*, 42 Neb. 772, and, after a careful examination of the proper method of review of causes of this nature by this court, we determined that proceedings in habeas corpus were civil in their nature and could, and would, be reviewed here on error proceedings, but not on appeal. We think the rule well supported in principle, and therefore recommend that the appeal in the case at bar be dismissed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the appeal in the case at bar is

DISMISSED.

FREMONT TELEPHONE COMPANY V. CHARLES KEELER.

FILED NOVEMBER 2, 1904. No. 13,632.

Evidence examined, and *held* not sufficient to sustain the judgment of the district court.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

Courtright & Sidner, for plaintiff in error.

F. W. Button, *contra.*

OLDHAM, C.

This was a suit for personal injuries, instituted by plaintiff in the court below against his employer, the Fremont Telephone Company. There was a trial to a jury in the court below, and verdict for plaintiff for \$150, judgment on the verdict, and defendant brings error to this court.

To dispose of the cause it will only be necessary to examine one of the alleged errors called to our attention in defendant's brief, and that is that the evidence is not sufficient to sustain the judgment. The facts underlying the controversy, as testified to by the plaintiff in the court below, are substantially as follows: Plaintiff, at the time of his injury, was a second lineman in the employ of the defendant telephone company. He had been engaged in stringing telephone wires on the poles of the company in the city of Fremont for about two weeks before the accident complained of. He was 23 years of age, and had done some work for the Bell Telephone Company before his employment by the defendant. On the day preceding the injury, defendant's foreman told plaintiff to prepare to string a telephone line along the side of a brick building in Fremont. To do this plaintiff had to procure a ladder, and drive wooden plugs between the bricks on the side of the building to support the attachments necessary to hold

the wires. The foreman seems to have given no instruction except as to the height at which the wires were to be strung, and to ask plaintiff if he could get a ladder to do the work. On the day of the injury, plaintiff borrowed a ladder from a paint shop, and placed it against the side of the building for the purpose of driving in the plugs; he ascended for about 15 feet, and says that, after he got to the top of the ladder, the foreman tossed him a plug, which he was to drive between the bricks. He placed one foot on the sill of a second-story window in the building and the other on the top of the ladder, and undertook to drive the plug between the bricks with a hand-ax, when he lost his balance and fell to the ground, sustaining the injury of which he complains.

The negligence alleged against the defendant in plaintiff's petition was, in substance, that he was without experience in stringing telephone wires on brick buildings, and that he should have been warned of the extra hazard of such an undertaking by defendant's foreman. We must confess, after a careful examination of plaintiff's testimony, that we are wholly unable to see any hidden or lurking danger in the occupation in which he was engaged, that required special instruction to apprise him of such fact, from either his employer or the foreman who stood in the place of the employer. He was not working with either defective or dangerous implements. He himself borrowed the ladder on which he ascended to his place of duty. There was no hidden defect, either in the ladder on which he stood, or in the hand-ax with which he drove the plugs, or in the plug furnished him, that in any manner contributed to the injury. It is not claimed that he was either blind, or insane, or of such very tender years as to be incapable of understanding the danger which must have been obvious to one having eyes to see, when he undertook to drive the plug. We therefore conclude that there is no evidence in the record tending to show any breach of any duty owed by the master to the employee, and, although we doubt not that plaintiff received a pain-

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ful injury from the accident, his misfortune is not, by any evidence in the record, connected with any negligent act on the part of his master.

We therefore recommend that the judgment of the district court be reversed and that the cause be remanded for further proceedings according to law.

AMES and LETTON, CO., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

STATE OF NEBRASKA, EX REL. GUSTAV PRITSCHAU, v. S.
H. SORNBORGER.

FILED NOVEMBER 2, 1904. No. 13,593.

Exceptions, Bill of: MANDAMUS. Where an *ex parte* order extending the time for the presentation of a bill of exceptions has been found upon a hearing to have been wrongfully and fraudulently obtained, a district judge may set the order aside, and refuse to settle and allow the bill because not presented within the statutory time. In such case he will not be compelled by mandamus to settle and allow the bill.

ORIGINAL application for a writ of mandamus to compel the allowance of a bill of exceptions. *Writ denied.*

C. E. Holland, for relator.

J. J. Thomas, contra.

LETTON, C.

This is an original action in this court for the purpose of compelling the Honorable S. H. Sornborger, lately judge of the district court for Seward county, to settle, allow and

sign a bill of exceptions in an action pending in said court. A summary statement of the allegations of the petition is that, on the 16th day of February, 1903, an action was pending in the district court for Seward county, wherein Gustav Pritschau was plaintiff and Rice Brothers & Nixon and others were defendants, wherein the W. J. Perry Live Stock & Commission Company and W. E. Langworthy, two of the defendants, recovered a final judgment against the plaintiff dismissing his action; that the presiding judge, the Honorable S. H. Sornborger, granted 40 days from the rising of the court to prepare and present a bill of exceptions; that, afterwards, upon a showing of diligence, said judge made an order extending the time in which to prepare and serve the bill of exceptions to 80 days from the rising of the court; that the term of court at which the action was tried adjourned *sine die* on the 16th day of May, 1903; that the proposed bill of exceptions was, on the 6th day of July, served upon the attorney of record for said defendants, who retained the same until after the 15th day of August, 1903, and on the 27th day of August, 1903, it was found upon the desk in the office of C. E. Holland, one of the attorneys for plaintiff Pritschau, without any amendments being suggested or proposed; that said proposed bill was presented to the respondent, S. H. Sornborger, for settlement and allowance within the time required by law; that said judge took away the said proposed bill and never returned same, but that, afterwards, in December, 1903, it was found in the office of J. J. Thomas, the attorney for said defendant, and was again presented by plaintiff's attorney to the said respondent, Sornborger, for settlement and allowance, on December 15, and that, afterwards, on the 24th day of December, respondent declined and refused to settle or allow said bill. The petition prays for a peremptory writ of *madamus* to compel the respondent to settle and allow the bill of exceptions. The answer of the respondent, after admitting the facts in relation to the rendition of the judgment, the allowance of the 40 days to prepare and present

the bill, and the making of the order extending the time for an additional 40 days, alleges that the bill of exceptions was presented to him in November, 1903; that it appeared that it had been tendered to adverse counsel on July 13, 1903, and service refused because it had not been served within the original 40 days allowed by the respondent; that, when the bill was presented to him for allowance by the relator's attorney, he observed that objection had been made to its allowance, and that he refused to consider the allowance of same without notice to the opposing counsel; that the matter of allowing and settling the bill of exceptions came on finally to be heard on the 24th day of December, 1903, which was a day of the regular November, 1903, term of the district court for Seward county, on the motion of the defendants to revoke, cancel and annul the order granting plaintiff an additional 40 days within which to prepare and serve said bill, and upon other objections to its allowance, at which hearing all of the parties in interest were represented by counsel; that upon a full hearing of the facts the respondent concluded that there was an entire lack of diligence on the part of the relator, and a clear case of gross negligence, and respondent therefore withdrew, canceled, revoked and annulled the former order granting an additional 40 days within which to prepare and serve the bill of exceptions; that no proceedings to reverse said order have been instituted.

No evidence was presented in this court, other than the original proposed bill of exceptions with the endorsements and memoranda written thereupon; but it sufficiently appeared from the statements and admission made upon the hearing that the facts were substantially as alleged in the pleadings.

It appears that the motion to set aside the order granting additional time was made upon the grounds that the defendant had no notice of the application for additional time; that no showing of diligence had been made; that the reporter had completed the bill of exceptions and

offered to deliver it to the plaintiff long prior to the expiration of the first 40 days allowed; that the obtaining of the order of extension was a fraud upon the court, and that it was solely owing to the plaintiff's neglect that the bill was not served within the first 40 days. At the hearing upon the motion to vacate the order, both parties appeared and were represented by counsel, and evidence was taken by the court, upon consideration of which an order revoking the order of July 3 was entered. It appears, then, that the district judge found at the hearing that when he made the order extending the time he had been imposed upon, and that upon ascertaining that fact he set aside the order made and refused to settle the bill of exceptions.

This he had a perfect right to do. It would be strange indeed if a judge who found he had been deceived in making an *ex parte* order extending the time to present a bill of exceptions could not deprive the offending party of any benefit from an order thus obtained, by refusing to give him the benefit of his wrongdoing upon an application to settle and allow the bill. Courts and judges are not thus impotent.

The matters set forth in the answer and the facts admitted constitute a good defense, and the respondent was justified in his refusal to settle the bill of exceptions.

The writ should be refused and proceeding dismissed at relator's costs.

By the Court: For the reasons stated in the foregoing opinion, the writ is refused and the proceeding dismissed at relator's costs.

WRIT DENIED.

CHARLES A. CLINE v. S. H. DEXTER, ADMINISTRATOR.

FILED NOVEMBER 2, 1904. No. 13,451.

Witness: COMPETENCY. Where an administrator introduces in evidence a letter from the adverse party giving a narrative of the transaction with the deceased party upon which the action is based, the evidence of the adverse party as to the transaction recited in the letter upon his own behalf is not incompetent under the provisions of section 329 of the code, and it is error to exclude the same.

ERROR to the district court for Merrick county: JAMES A. GRIMISON, JUDGE. *Reversed.*

John C. Martin, for plaintiff in error.

W. T. Thompson, *contra.*

LETTON, C.

This action was brought by the administrator of the estate of Samuel Cline, deceased, to recover from the Merrick County Bank the balance of a deposit due from said bank to Samuel Cline at the time of his death. The Merrick County Bank answered, disclaiming any interest in the money on deposit except as a depository, brought into court the amount of the deposit, and alleged that the same is claimed both by the estate of Samuel Cline, deceased, and by Purington & Cline, a copartnership. Purington & Cline intervened, averring that they were a partnership engaged in the live stock commission business at South Omaha, Nebraska; that, from the 26th day of February, 1902, until his death, Samuel Cline was their agent for the purpose of purchasing and shipping stock for them at Clarks, Merrick county, Nebraska; that for the convenience of their customers they placed certain money with the Merrick County Bank from time to time during said agency, subject to the order of Samuel Cline, for the purpose of purchasing and shipping stock for them, and for

no other purpose; that, on the 4th day of May, 1902, when Samuel Cline died, there was on deposit in said county \$262.68 of their funds, and they pray judgment for that sum, and that the money tendered to be paid to them. A general denial was filed to these allegations. Afterwards, Charles A. Cline was substituted as defendant for Purington & Cline. Trial was had to the court, without the intervention of a jury, and the court found that the funds are the personal property of the estate of Samuel Cline, deceased, and adjudged the payment of the same to the administrator. From this judgment Charles A. Cline prosecutes error to this court.

A number of assignments of error have been made, but, since a new trial will be required, it is unnecessary to consider more than one or two of them. It is conceded by plaintiff in error that, since the deposit register of the bank and the passbook of Samuel Cline both show this account to have been carried in the name of Samuel Cline, this is sufficient, in the absence of other proof, to establish *prima facie* a liability of the bank to Samuel Cline, which passed to the estate as an asset. But he contends that such *prima facie* case is founded solely upon a legal presumption, which can be overcome by sufficient competent proof as to the true character of the deposit. With this view of the law of the case we are agreed, and, when sufficient competent proof has been offered by him to overcome the presumption and show that the money was the money of Purington & Cline to the satisfaction of a court or jury, he has made his case.

It is assigned as error that the court erred in not permitting the plaintiff in error to show that the plaintiff in the court below was not the real party in interest. The offer was to show that the widow, as one of the heirs at law, together with the administrator and the guardian of the minor heirs, had made an arrangement with a bank to carry on this litigation in the name of the administrator, and that, if recovery was had by the administrator, the proceeds would be set aside to the widow as her allowance,

and then by her given to said bank to apply upon a debt of her husband. It will be observed that the agreement offered to be shown required the participation of an administrator and a guardian, both of which officers were incompetent to enter into any such agreement; that it further required an order to be made by a county court, setting aside the money to the widow as her allowance, before it could be carried into effect. All this was to be done in the future. The evidence offered was of an illegal agreement, was not competent and would not have proved that the plaintiff was not the real party in interest.

The next error assigned is that the court erred in not allowing the plaintiff in error to testify as to the verbal contract with Samuel Cline under which he received the money. Evidence along this line was excluded by the court under the provisions of section 329 of the code. Plaintiff in error contends, however, that, because the administrator introduced in evidence a letter from Charles A. Cline to the widow of Samuel Cline reciting the original transaction between Samuel Cline and Purington & Cline, he was entitled to give his version of the transaction recited in the letter, upon the theory that, the administrator having offered evidence in regard to the original transaction, the plaintiff in error was also entitled to testify in regard to the transaction. The statutory rule is that where the representative of a deceased party introduces a witness who shall have testified in regard to the transaction with the deceased, the adverse party may also be examined upon the same point. In *Niccolls v. Esterly*, 16 Kan. 32, it was held that, while a party may not testify in his own behalf to a transaction had personally by him with the deceased partner, yet, if he is called by such adverse party to testify as to a part of any such transaction, he may in his own behalf testify as to the whole of such transaction. The burden of proof under the pleadings in that case was upon the defendant. He called as his witness the plaintiff, Esterly, who testified with regard to the transaction with the deceased person. The plaintiff

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afterwards testified in his own behalf in reference to the same transactions as to which he had testified at the instance of the defendant. The court say:

“While, if the defendant had so chosen, none of this testimony could have been admitted, yet, having interrogated the plaintiff concerning these matters, and having obtained some of the facts concerning them, he could not thereafter object to the plaintiff's giving all the facts. By introducing part, he opens the door to all. Just as a party may not introduce his own statements in his own behalf, yet if his adversary draws out part of a conversation he may introduce the balance. The principle is general, that where a particular witness, or a certain kind of testimony, may be excluded, if the party who has the right to insist upon the exclusion waives that right, and himself calls the witness, or introduces the testimony, he cannot, after he has obtained what he desires, insist upon the exclusion, so far at least as to prevent a full development of the matters which he has partially presented.” This case is cited and followed in *Roberts v. Briscoe*, 44 Ohio St. 596, the Ohio court saying:

“The adverse and surviving party, when compelled to testify by the executor or administrator, cannot reasonably complain; for, though a party, he can then be examined fully in his own behalf on the subject of his examination in chief.” To this effect also is *Taylor v. Ainsworth*, 49 Neb. 696.

While we think the rule is clear that, where the adverse party is called by the administrator to testify as to the transaction with the deceased, he is entitled to testify in his own behalf as to the same transaction, yet, the question here presented is somewhat different. The letter which was introduced by the administrator was a narrative of the transaction with the deceased by the adverse party, which was evidently offered by the administrator upon the theory that its contents were an admission against the interest of the person writing it, and that it would aid the administrator in maintaining his theory of the case. It was

offered for the purpose of showing what the transaction actually was, and, though it was not the oral testimony of the adverse party, it seems to us that, since it was his declarations and statements, and was offered as evidence for the purpose of showing the facts as to the transaction, the principle is the same as if he had been placed upon the witness stand by the administrator and had given his testimony for the same purpose. Having offered evidence of the original transaction, the administrator cannot now say that the adverse party should not also testify to it. He cannot take the benefit of the story of the transaction recited in the letter and, at the same time, refuse to give the adverse party the opportunity to testify in regard to the same matter. *Taylor v. Ainsworth, supra; American Savings Bank v. Estate of Harrington*, 34 Neb. 597; *Parrish v. McNeal*, 36 Neb. 727.

We are of the opinion that the evidence offered should have been received, and that its rejection was prejudicial error; and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WESTINGHOUSE COMPANY V. JOHN L. MEIXEL ET AL.

FILED NOVEMBER 2, 1904. No. 13,614.

1. **Sale: WARRANTY: DEFENSE.** Where the petition alleges that the plaintiff agreed with the defendant to purchase certain threshing machinery, and that he received the same, subject to an agreement whereby he was to take such machinery upon trial, that it was warranted to be well fitted for the purposes for which it was sold, and that it shall operate to his satisfaction, and that

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if not satisfactory he might return the machinery and receive back the notes and personal property given in consideration therefor; and the answer "admits that the property was taken under warranty, and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in said petition," *Held*, That the defendant is not entitled under such pleadings to prove and rely as a defense upon certain conditions in a written contract between the parties, which is not pleaded in the answer.

2. **Defense: NEW MATTER.** Such a defense is new matter, and must be pleaded before it can be proved.
3. **Waiver.** Under the circumstances set forth in the opinion, *held*, that the plaintiff in error waived the provisions of the written contract with reference to the retention of the machinery after a four-days' trial constituting an acceptance of the same.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Mockett & Polk and John A. Whitmore, for plaintiff in error.

Hainer & Smith, contra.

LETTON, C.

This cause was brought in the district court for Hamilton county by John L. Meixel and Ina H. Meixel, as plaintiffs, against the Westinghouse Company, defendant. The petition alleges, in substance, that the Westinghouse Company is a New York corporation; that, on February 21, 1902, the plaintiffs at Aurora, Nebraska, entered into a contract with the defendant, whereby they agreed to purchase a Westinghouse thresher engine, separator, stacker and loader, complete; that, by the terms of the contract, the plaintiffs were to execute their notes to the amount of \$1,850, pay the freight charges on the new machinery and deliver to the defendant a second-hand engine, loader and separator which were then owned by the plaintiffs, and which were agreed by the parties to be of the value of \$700, and, in case plaintiffs finally purchased the prop-

erty, this was to be taken as a payment of that amount upon the property purchased. To induce the plaintiffs to purchase the property, the defendant represented and warranted that it was well and properly constructed, and that it was well fitted for the purpose of threshing, separating and cleaning grain, and that it should work to the satisfaction of the plaintiffs; and it was further agreed that the plaintiffs should receive the property for a reasonable time for the purpose of making a trial of the same, and if it failed to give satisfaction, then notice to be given defendant and an opportunity to make it operate satisfactorily, but, if it failed to perform the work to plaintiffs' satisfaction, they were to return the machinery to the defendant's agent, and the money, property and notes which had been delivered to the defendant should be returned to the plaintiffs, and that the title to the machinery should remain in the defendant until the full consummation of the agreement for the sale and purchase of the same. Plaintiffs allege that they executed the notes, and delivered the machinery mentioned, and took the thresher outfit for the purpose of giving it a trial under the agreement. The petition recites a large number of defects in the operation of the machinery, and that the machine wholly failed to work properly or in a satisfactory manner to the plaintiffs, or to properly perform the work for which it had been delivered; that, upon ascertaining the fact, the plaintiffs notified the defendant, and also notified its agent at Aurora; that the defendant, through its agents, attempted to put said machinery in proper working order so as to comply with the contract; that the defendant, after having attempted at different times to remedy the defects and to place the machinery in proper condition, abandoned said property, and notified plaintiffs that they would make no further attempts to remedy the defects; that the machinery taken together at the time of the abandonment was wholly worthless for the purposes of a threshing outfit, and that, within 48 hours after defendant refused to attempt to place said machinery in proper work-

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ing order and abandoned the same, the plaintiffs returned said machinery to the agent of the defendant, demanded the return of the money and notes, and also the return of the second-hand engine, loader and separator which they had delivered to the defendant, but that the defendant refused to return the same.

For a second count the plaintiffs, after making the same allegations with reference to the contract and the failure of the machinery to work properly, alleged that a number of the notes given are not yet due; that the defendant has disposed of some of said notes to innocent purchasers; that plaintiffs are without adequate remedy at law; and they ask that the court render an alternative judgment requiring defendant to deposit the notes with the clerk of the court for cancelation within a short day to be named by the court, or to give plaintiffs a judgment for their face value. They also ask judgment for the value of the machinery turned over to the defendant. Since the proper disposition of the case rests mainly upon the question of what issues were raised by the pleadings, we copy the answer at length.

"Comes now the above named defendant and, for answer to the first count of plaintiffs' petition, admits that the defendant is a corporation organized under the laws of the state of New York; that on the 21st day of February, 1902, at Aurora, Nebraska, plaintiffs and defendant entered into a contract for the purchase and sale of the machinery described in said petition; that plaintiffs received said machinery, paid freight thereon in the sum of \$143.75, turned over to defendant the property of plaintiffs in said petition described, as part payment of the purchase price of said machinery, and made and delivered to defendant their promissory notes for the balance of said purchase price, to wit, \$1,850, as mentioned and described in the petition. The defendant further admits that said machinery was accepted by the plaintiffs under warranty and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in said

petition. For a second and further defense to said first count, defendant denies every allegation thereof not herein specifically admitted. For answer to that part of the second count of said petition not contained in the first count thereof, defendant admits that the notes given by plaintiffs to defendant and described in plaintiffs' petition are negotiable promissory notes, and that a part of the same are not yet due. For a second and further defense to the additional allegations of said second count, defendant denies each and all said allegations not herein specifically admitted." We find no reply in the transcript.

At the request of the plaintiffs, the first cause of action set up in the petition was set off to be tried by a jury, and the second cause of action was retained for trial by the court. The jury found for the plaintiffs as to the first cause of action, and so likewise did the court as to the second count. Judgment was rendered, from which the defendant prosecutes error to this court.

The plaintiffs in error contend, first, that there is a variance between the pleading and the proof, since the proof showed a written warranty; that the purchaser is bound by the terms of his contract and all the conditions therein unless he pleads and proves a waiver of such conditions, and that it is necessary to plead a waiver in order to offer proof thereof, and that the conditions in the written warranty are conditions precedent to the right of rescission, and must be complied with unless a waiver is pleaded and proved. It will be observed that the answer admits "that said machinery was accepted by the plaintiffs under warranty and subject to trial, but denies that the terms of said warranty and the conditions of such trial are as alleged in the petition." This action, under the allegations of the petition, is not an action brought upon the warranty, but an action for the recovery of certain personal property and for the cancelation of notes delivered by Meixel to the Westinghouse Company, to be held by it pending a trial of the machinery to ascertain if it operated satisfactorily to Meixel. If it so operated he

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agreed to purchase it, but if it did not so operate he was under no such obligation. The petition alleges that the machinery failed upon trial and that Meixel, in accordance with the agreement, returned the same and demanded a return of his property and notes. The answer admits that the machinery was accepted under warranty and subject to trial, and denies, in general terms, the other allegations of the petition, but fails to plead the existence of any other agreement than that set out in the plaintiffs' petition. Under this state of the pleadings, the only question left to be determined was whether the machinery was defective, and whether Meixel had carried out the provisions of the conditional agreement upon his part.

Instruction numbered 5 given by the court, which is as follows, is complained of: "The principal question for the jury to determine is whether or not the threshing outfit in fact did good work and operated to the satisfaction of the plaintiffs. This question should be determined wholly from the evidence introduced before you. If the jury believe, from the evidence, that such threshing outfit, in fact, did not do good work, and that it was not adapted to the use for which it was purchased, and that it failed to operate satisfactorily to the plaintiffs, and you further find that the defendant, when notified of such failure, failed to so adjust said threshing outfit as to make it work satisfactorily, and thereafter refused to further adjust said machinery, and that plaintiffs within 48 hours thereafter returned said threshing outfit to defendant's agent at Aurora, and demanded the return of their property and notes, then the plaintiffs would be entitled to your verdict." This instruction however correctly states the issues framed by the pleadings and was proper to be given.

A large number of witnesses were examined as to the facts with reference to the failure of the machine to perform good and satisfactory work. It would seem that the friction clutch, which is a device brought into use when it is desired to use that part of the machinery of the engine which gives it its power of locomotion, was defect-

ive, and that Meixel had considerable trouble in moving his engine from place to place on account of this defect. The season had been wet and rainy, and a great deal of the grain was damp and in bad condition to thresh. It is shown that the engine consumed large quantities of coal for the work that it performed, and that the separator failed to separate the wheat from the straw to such an extent that a great deal of the wheat was carried over with the straw, and spilled upon the ground at the end of the blow stacker; that Meixel had serious complaints from his patrons with reference to the operation of the machine, and the manner in which it wasted grain, and that he complained to the agent of the company of these defects. That, on the 12th of August, H. T. Jensen, the agent of the defendant, from whom he bought the machine, went to look at the engine, and wrote to the defendant's agency at Council Bluffs with reference to the friction clutch and to the large coal consumption; notifying them that it was of the utmost importance that they send one of their experts at once. In response to this letter, a man named Robinson was sent on the 14th instant to look at the engine. He did practically nothing toward remedying the defect, and, on the 28th of August, Meixel having again complained, another letter was written by Jensen to the Council Bluffs agency with reference to the machine. In reply to this letter, the Council Bluffs agency wrote Jensen saying they had referred his letter and Meixel's complaint to the factory. On the 30th day of August, Jensen also wrote to the Schenectady office of the defendant, describing the complaint made regarding the engine and the condition of the machinery. On September 19, 1902, Meixel's attorneys, Messrs. Hainer & Smith, at his request, wrote to the Westinghouse Company at Schenectady, New York, explaining the trouble that Meixel had had, and requesting that the outfit be put in proper condition; suggesting that they send a man with a new clutch. To this letter of September 19 the company replied that the engine was not to blame; that the trouble was due to the improper handling

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of the engine, and to the use of an improper lubricant, but that they were friendly to Meixel and were preparing another friction clutch, which they would send him in a few days. On October 2, 1902, Hainer & Smith again wrote to Schenectady, reciting the defects in the engine and separator, combating the assertion that the trouble was caused by a defective lubricant, requesting that the company send an expert to give the machinery a further test, and offering all possible friendly assistance to that end. On October 17, 1902, H. J. Edwards, the Council Bluffs agent of the defendant, went to see Meixel at Aurora with reference to the collection of Meixel's note that was due October 1. At that time Meixel said that he did not intend to pay the note, that the engine burned too much coal, that the separator had wasted the grain, and that he did not intend to pay the note unless the machine would run right. On October 27, one Corey, an employee of the defendant, was sent by the company to the place where Meixel was threshing. He made some changes in the separator, and the next day made some other adjustments, and tested the coal consumption of the engine. It seems that, after he had done all he could, Meixel was still dissatisfied with the work the machine was doing, and, since Corey had failed to make it do satisfactory work, he told him that he would not keep the machine, and asked him where to take it. Corey told him he had bought the machine, and gave him no directions as to what disposition to make of it. Within 48 hours after this, Meixel delivered the machine to the defendant's agent at Aurora. Meixel's complaints and the company's promises and efforts to remedy the defect continued up until the time of the return of the machinery. Under this state of facts, the company waived the provision of the written contract that continued use after four days' trial should constitute an acceptance.

There is a conflict in the evidence as to the defects in the machinery, but there is ample evidence to support the verdict of the jury. Numerous errors are assigned in regard to the introduction of evidence and with reference

to instructions of the court, but these assignments are based upon the contention that compliance on the part of Meixel with the terms of the written warranty were conditions precedent to his right to rescind, and must be pleaded before he would be entitled to maintain this action. Under the pleadings, however, as they stand, the action is not upon the warranty. If the plaintiff in error desired to take advantage of the provisions of the written contract, it should have pleaded the same in its answer.

It is complained that the decree of the court requiring the surrender of the note to the clerk of the district court for cancelation within 10 days has the effect of denying to the plaintiff in error the right of review. This is an erroneous conception of the force and effect of the decree. When its operation was suspended by the execution of a supersedeas bond, the time to deposit the notes for cancelation was extended until 10 days after a final affirmance of the judgment.

The case was carefully tried. The rulings of the court upon the evidence, and its instructions to the jury, were in accordance with the issues raised by the pleadings.

We recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FREMONT BREWING COMPANY V. WILLIAM SCHULZ.

FILED NOVEMBER 2, 1904. No. 13,631.

1. **Negligence: INSTRUCTIONS.** Issues as to the existence of negligence and contributory negligence are for the jury to determine when the evidence is conflicting, and where different minds might reasonably draw different inferences as to these matters from the facts established. It is only where the evidence is insufficient

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to support a verdict that the court is justified in instructing as a matter of law that negligence did not exist.

2. ———: ———. Under the facts set forth in the opinion, *Held*. That the trial court rightfully submitted the question of negligence to the jury, and, further, that there was sufficient evidence to support the verdict.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed*.

Courtright & Sidner, for plaintiff in error.

F. W. Button, *contra*.

LETTON, C.

The plaintiff in error, the Fremont Brewing Company, is the owner of a brewery at Fremont, Nebraska, and was operating the same during the year 1903. On July 16, 1903, William Schulz was employed by the brewing company in its grain house. It appears that a grain scoop therein was operated by steam power in such a manner that it worked by means of a friction wheel situated in the room below where Schulz was working, which friction wheel was brought into gear by means of a lever, a rope fastened to one end of the lever passing horizontally through a pulley, and thence perpendicularly up through a hole in the floor to the place where Schulz was stationed. Schulz's duty was, when the word was given by his fellow laborer, to pull upon said rope sufficiently to bring the friction wheel into gear, and hold it in that position until a windlass in the room below, which it operated, wound up a rope which passed up through another hole in the floor, thence to a pulley near the ceiling of the room where Schulz was working, and from thence over pulleys in the grain room to the scoop. The manner of operation was that, when it was desired to use the scoop, one man took hold of the same and gave the word to Schulz, who then pulled upon the rope which placed the friction wheel in gear and set the windlass in motion. He then held it tight,

so as to keep the wheels in gear while the winding of the rope pulled the scoop. It appears that the opening in the floor through which the large rope came which operated the scoop was about 4 inches wide and 38 inches long, with a guard about 4 inches high placed around it, the object of the guard being, as the plaintiff in error claims, merely to prevent grain from falling through the hole, while the defendant in error asserts that its purpose was to prevent the slack of the large rope from falling over onto the floor and forming a loop thereon. At the time the accident happened Schulz testifies that he had worked in the operation of this machine at intervals during the 3 weeks prior to the time of the injury, the total time of his operation of the same being about 5 or 6 hours altogether. That he was not instructed about how to operate the machine; that when the man who was operating the scoop would call to him to go ahead, he would pull up the gear rope; that he had to use all his strength in holding it until the man shouted "stop," when he released it. That on the day of the accident when he pulled upon the rope, after the command had been given by the man at the scoop, he noticed that the gear rope did not want to come; that he then put all his weight on it, and that finally it came suddenly; that he stumbled forward toward the slot in the floor that the large rope came through; he next noticed that his foot was in the slot, with the big rope which operated the scoop around his ankle; that when he let go of the gear rope the machine did not stop as it should have done, but kept going; that his foot was drawn into the slot; that it broke the guard board and broke his leg. He further testifies that the gear rope in the room below, which passed from the lever which operated the friction wheel through the pulley and thence passed up through the floor, had been broken, and that it had been repaired by using two small ropes which passed through the pulley instead of the large rope. The negligence charged is that the company failed to warn him of the dangers of the employment, failed properly to guard the opening in the

floor so as to prevent the large rope from forming a loop, and that it had negligently failed to keep in proper repair the rope and pulley beneath the floor, by which the friction lever was operated. The theory of the defendant in error being that one of the defective small ropes in the lower room caught at the side of the pulley when Schulz first pulled; that it suddenly slipped and gave way when he pulled harder, causing him to fall, and that afterwards when he released the rope on falling it again caught, which prevented the lever from acting, and kept the machine at work, thus pulling on the gear rope, drawing his foot into the hole and breaking his leg; that if proper precaution had been taken, either to guard the hole in the floor or to maintain the rope and pulley in the lower room in proper condition, the accident would not have happened. The sole ground of error alleged is that the evidence does not support the verdict, and that the jury should have been instructed to find for the plaintiff in error.

There is a conflict in the evidence with regard to the condition of the rope and pulley which operated the lever at the time of the accident. The testimony on the one hand being that 2 quarter-inch ropes had been used in the place of one half-inch rope; that there was a space of about five-eighths of an inch between the edge of the pulley and the wooden block supporting it, so that the small rope could catch thereon; and that the block sustaining the pulley introduced in evidence by the brewing company had been changed, and was not the same block that was in use at that time. On the other hand, the testimony is that but one rope was used with the pulley, instead of 2 small ones, and that the block and pulley introduced in evidence were the same as were in use at the time of the accident. The uncontradicted testimony shows that machines of this character have largely gone out of use, being replaced by automatic machines; and that, when they were in common use, guard rails of from 18 inches to 2 feet in height were usually placed around the slot or opening in the floor through which the rope works. The

plaintiff in error asserts that the rope could not have gotten around the plaintiff's ankle unless he had placed it there himself, while the theory of the defendant in error is that, when his fellow laborer inserted the scoop in the grain, a slack was caused in the rope, which ran back over the pulleys and formed a loop upon the floor. That, when he stumbled by reason of the rope below suddenly being released, his foot was caught in the loop and thereby drawn into the slot. There is no evidence that a loop was there except the inference which may be drawn from the fact that Schulz's foot was caught and pulled into the slot, though the testimony shows that when the scoop is inserted in the grain it may cause 18 inches to 3 feet of slack in the rope. It seems clear, however, that, if a guard of 18 inches to 2 feet had been placed around the hole in the floor, the accident in all probability would not have happened.

The issues as to the existence of negligence and contributory negligence are for the jury to determine when the evidence is conflicting, and where different minds might reasonably draw different inferences as to these matters from the facts established. It is only where the evidence is insufficient to support a verdict that the court is justified in instructing as a matter of law that negligence did not exist. Under the testimony which tended to prove the substitution of 2 quarter-inch ropes for a half-inch rope in the working of the lever, and which tended to show that the pulley was so loose that a distance of five-eighths of an inch existed at the side of it, in which a small rope might catch, then, the probability of the rope becoming caught and failing to stop the machine might have been foreseen, and the plaintiff in error would be guilty of negligence in allowing this condition to exist; and if the usual practice in the construction of machinery of this nature was to place a guard 18 inches to 2 feet high around the slot where the rope operated, so that a slack of 18 inches to 3 feet could not form a loop upon the floor, then, ordinary care on the part of the plaintiff in

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error would have required the construction of such guard, and failure to furnish such guard would be negligence. The testimony offered by the defendant in error upon these points required the submission of the issue as to whether negligence existed or not to the jury, and it would have been erroneous for the court to determine the question as a matter of law. For these reasons, the judgment of the district court should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF
ATKINSON, v. DANIEL J. CRONIN, TREASURER OF HOLT
COUNTY, NEBRASKA.

F LED NOVEMBER 16, 1904. No. 13,664.

1. **Act Constitutional.** The act of 1903, amending sections 18 and 20 of article III, chapter 18, and section 3a of article XIII, chapter 83 of the Compiled Statutes of 1901, so far as it relates to the deposit of county funds, was constitutionally adopted and is a valid law.
2. **County Funds, Deposit of.** Under the law as thus amended it is the duty of each county treasurer to keep at all times on deposit in each of the depository banks of his county such a proportionate share of the public money subject to deposit as the amount of the paid up capital stock of each bank bears to the whole amount of paid up capital stock of all of such banks.
3. **Mandamus** will lie to compel such officer to perform his duty, and comply with the provisions of said law.

ORIGINAL application for a writ of mandamus to compel respondent to deposit in relator bank its pro rata share of the county funds. *Writ allowed.*

R. R. Dickson, for relator.

Arthur F. Mullen and M. F. Harrington, contra.

BARNES, J.

On the 5th day of April, 1904, the relator, the First National Bank of Atkinson, filed its application in this court against the respondent, Daniel J. Cronin, as treasurer of Holt county, praying for a peremptory writ of mandamus to compel the respondent to deposit in the relator bank its pro rata share of the funds of Holt county, as provided by section 18, article III, chapter 18, Compiled Statutes, 1903 (Annotated Statutes, 10870).. An alternative writ was allowed, returnable May 3, 1904, and on that date the respondent filed his answer herein, by which he practically admitted the allegations of the alternative writ, but alleged that the law in question was never constitutionally passed by the legislature, and was therefore void. For that reason respondent prayed that the alternative writ be quashed, and the action dismissed.

From an examination of the pleadings and the stipulation on which the case was submitted, there appears to be no dispute as to the facts. The record discloses that there are in Holt county 11 banking institutions, with an aggregate paid up capital of \$203,500; that all of said banks, including the relator, have been selected by the county board of supervisors as county depositories; that they have all given bonds, which have been approved, as required by law, and, if the act in question is valid, each one of the said banks is entitled to receive on deposit its pro rata share of the county funds; that before and at the time of the commencement of this action the respondent had refused to carry out the provisions of the law, and that the relator had on deposit at that time only \$3,759.24 of the said funds, when its pro rata share thereof was \$8,697.55. So it may be said at the outset that, unless the contention of the respondent as to the invalidity of the

law in question is sustained, the relator was entitled to the relief prayed for by its petition.

An examination of the legislative journals shows, and in fact the pleadings and stipulation state, that the law which is the basis of the relator's right of action was passed by the legislature of 1903, and was known as house roll No. 136. It was introduced in the house under the following title: "A bill for an act to amend sections eighteen (18) and twenty (20) of chapter eighteen (18), article three (3) of the Compiled Statutes of Nebraska of 1901, and to repeal the said original sections." It was read the first time on the 16th day of January, 1903; the second time on the 19th day of January, and referred to the committee on county boundaries, county seats and township organizations. On the 25th day of February the bill was read the third time, put upon its passage and received the necessary constitutional number of votes to pass it with the emergency clause. The bill was then sent to the senate, where it was read the first time on the 26th day of February; the second time on the 27th day of that month, and it was then referred to the committee on counties and county boundaries. On the 5th day of March it was reported back to the senate by the committee, under the same title by which it had been read three times in the house and twice in the senate, with the recommendation that it be passed. Thereafter it was amended in the committee of the whole and referred back to the senate, with the recommendation that it be recommitted to the judiciary committee; that committee recommended that the title be amended so as to read as follows: "A bill for an act to amend sections eighteen (18) and twenty (20) of article three (3) of chapter eighteen (18) and section 3a of article thirteen (13) of chapter 83 of the Compiled Statutes of Nebraska for 1901 and to repeal said original section." The body of the bill was also amended so as to include an amendment of section 3a, article XIII, chapter 83 of the Compiled Statutes of 1901, and thus extend its provisions to the deposit of public money by the state

treasurer in depository banks. The bill was thereupon read in the senate the third time, was put upon its passage, and received 31 votes, which were more than the number sufficient for its passage, with the emergency clause. It was thereafter reported back to the house with the request that the house concur in the senate amendments. It was then read in the house, and the senate amendments were concurred in. It was afterwards properly signed by the presiding officers of the house and senate, and regularly approved by the governor.

It is the contention of the respondent that the bill in question was not read in the house of representatives on three different days with the identical title that it bore at the time of its introduction; and the argument of respondent's counsel proceeds on the assumption that the title and body of the bill, as changed by the senate amendments, must have been read at large on three different days in each branch of the legislature after the adoption of such amendments, before it could be said that the bill was constitutionally passed. Respondent further assumes that the change in the title was a substantial one. Both of these assumptions are unwarranted. It is true that by section 11, article III of the constitution, it is provided:

"Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

But this provision was not intended to prevent amendments and corrections of mistakes in the title of bills pending before the legislature; and it is not believed that any authority can be found which supports respondent's position. It has never been held by this court, nor by any other, so far as we have been able to ascertain, that it is not competent for the legislature to correct defects or

imperfections in the title of a bill, or amend it, at any time before it is put upon its final passage. As was said in *Richards v. State*, 65 Neb. 808:

"The constitution requires that the subject of the bill shall be expressed in its title, but no law has ever been annulled because it passed through some of the earlier stages of legislation under an imperfect title. The title is amendable as well as the body of the bill, and it is in accordance with accepted canons of legislative procedure to amend it at any time before final action is taken."

In *Attorney General v. Rice*, 64 Mich. 385, the court said:

"If the object of the act as passed is fully expressed in its title, the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. To hold otherwise would, in many cases, prevent any alteration or amendment of a bill after its introduction, as, in legislative practice, it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill."

In *Cleland v. Anderson*, 66 Neb. 252, we said:

"Section 11, article 3, of the constitution, does not require that amendments made to a bill while under consideration by the legislature be read at large before each house on three different days; but it is sufficient that such amendments be printed, as required by said section, and that the bill, as amended, be adopted by both houses."

That the course above indicated was pursued by the legislature in passing the bill in question is conclusively shown by the journals of that body.

Again, the change of the title, except as to the clause which relates to section 3a, above mentioned, was not material. The title to the bill, as introduced, was, "A bill for an act to amend sections eighteen (18) and twenty (20) of chapter eighteen (18) of article three (3) of the Compiled Statutes of the state of Nebraska of 1901, and to repeal said original sections"; and the change effected by the legislature, leaving out of consideration that part

of the title as finally agreed to which treats of section 3a, article XIII, chapter 83, was simply to transpose a part of it so as to read, "article 3 of chapter 18," instead of "chapter 18 of article 3." No one could have been misled by the title to the bill, as originally introduced, because the slightest investigation would inform any one what particular sections of the statute were to be amended thereby.

The respondent further assails the bill on the ground that the senate amendment thereto was not germane to the two sections mentioned in its original title, and was not embraced therein. Conceding that this objection is well taken, which need not be determined in this action, that part of the act which relates to the deposit of county funds is valid and must be upheld. It seems clear that so much of the bill as relates to the deposit of state funds by the state treasurer may be rejected without affecting that part of the law covered by the original title. Where this can be done, so much of the law as is valid will be upheld. *State v. Stuht*, 52 Neb. 209; *State v. Stewart*, 52 Neb. 243.

We therefore hold the act in question, so far as it relates to the matter in controversy in this case, was constitutionally adopted, and is a valid law. As no other defense was interposed to the issuance of a peremptory writ, it follows that the relator at the time of the commencement of this action was entitled to the relief prayed for, and a peremptory writ of mandamus is awarded in accordance with the prayer of the relator's petition.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. FIRST NATIONAL BANK OF
O'NEILL, v. DANIEL J. CRONIN, TREASURER OF HOLT
COUNTY, NEBRASKA.

FILED NOVEMBER 16, 1904. No. 13,665.

Mandamus. The opinion in *State, ex rel. First National Bank of Atkinson, v. Cronin, ante*, p. 636, is approved and followed. Peremptory writ of mandamus allowed.

ORIGINAL application for a writ of mandamus to compel respondent to deposit in relator bank its pro rata share of the county funds. *Writ allowed.*

R. R. Dickson, for relator.

Arthur F. Mullen and *M. F. Harrington*, *contra*.

BARNES, J.

The application herein for a peremptory writ of mandamus was filed in this court at the same time that *State, ex rel. First National Bank of Atkinson, v. Cronin, ante*, p. 636, was commenced; and an alternative writ was issued, returnable May 3, 1904. The application was based on a like state of facts, and the return to the alternative writ was the same as in the case above mentioned. It appears that at the time the action was commenced the relator had on deposit only \$12,031.82 of the county funds, when its pro rata share of said funds was \$17,595. Under the undisputed facts, and the rule announced in the opinion cited, the relator is entitled to the relief prayed for, and a peremptory writ of mandamus is therefore allowed.

WRIT ALLOWED.

HELEN SCHWINGEL ET AL., APPELLANTS, V. JOHN HENRY
ANTHES ET AL., APPELLEES.*

FILED NOVEMBER 16, 1904. No. 13,378.

Trusts: PRESUMPTION. One who acquires a trust estate with knowledge of its character, and while occupying confidential relations toward it and the *cestuis que trustent*, will be presumed to have taken the title subject to the trust, and that presumption cannot be rebutted without evidence, nor by such as is vague and ambiguous.

APPEAL from the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Judgment of affirmance vacated. Judgment of district court reversed.*

H. C. Palmer, John C. Stevens and John J. Sullivan,
for appellants.

S. W. Christy, J. L. Epperson & Sons and Thomas H.
Matters, contra.

AMES, C.

This is a rehearing from a former decision published unofficially in 5 Neb. (Unof.) 345. The case, as it is now regarded, presents some aspects not adverted to on the former argument, and the statement of facts already made needs to be somewhat supplemented. The will, which, together with the deed by the testator to his wife, constitutes the common source of title of the parties to this action, appears to have been drawn by the testator's own hand. It is apparent from a moment's inspection of it that he was not only not familiar with legal forms or phraseology, but that, being of foreign nativity, he was unable to express himself accurately in the English language, upon ordinary subjects of conversation. The following is, as far as possible, a literal copy of the instrument.

* Rehearing denied. See opinion, p. 649, *post*.

Schwingel v. Anthes.

"This 6 day of Sep. 1886. To whom it may concern.

"This is my Last Will Testament of Jacob W. Anthes of the county of Clay stat of Neb

"Mindfull of the uncertainties of human life do make buplish and declare this My last will and testament in the manner following first after the paiment of my just depts and funeral expenses I give devise and bequeath to My two sons Henery Anthes and W. C. Anthes each \$500, five Hundred Dollars .To My daughters Helen Schwingel Elisbet Schwab and Katarin Briedenbah shall have Equally withe to the rememder of all my Estates both Real and personal whict the two sons Henery Anthes and W. C. Anthes schare and schare alike

"The said Helen Schwingel received the sum of \$250 will I was living whearth shall be deducked from widoud interest (2) Second id is My will tat My wife Elisabeth Anthes schal have all the real and personel estates fore her own jues wile schea is living after her dead id schall be and becom as discriebt in this will abouvf

"I hereby nominad and appoint my wife Ealisabet Anthes the executor of this my last will and testament and herepy authorise empower her the said Elisabeth Anthes to compound compromise and settle any claim or demand which may be against or in favor of my said estate in witness whereof I have hereunto set my hand and seal this 6 day of Sep 1886

"Signed published and declared by the said Jacob W. Anthes to be his last will and testament is presence of us who have signed our names ad his request as witnesses is his presence an in the presence of caed other.

"JACOB W. ANTHER."

For the right disposition of this suit much depends, in my opinion, upon the true construction of the will, a subject which seems to have been, hitherto, somewhat neglected.

For an interpretation of this instrument it is unnecessary to repeat the settled rule of this court that the object to be kept principally and constantly in view is to ascer-

tain the intent of the testator, and, in so far as it is consistent with general rules of law, to carry it into effect. A circumstance throwing light upon this question is the fact that he had no personal property of considerable value, and that he was indebted to a relatively large amount in addition to the sum of \$3,500, for which all his real estate was incumbered by mortgage. It is clear, therefore, that he anticipated that some, if not all, of his lands, would be required to be sold for the payment of his unsecured obligations, and, whether wittingly or not, he employed language apt for the purpose of charging them as liens thereon. 2 Jarman, Wills (6th ed.), *1390 *et seq.* This fact, perhaps, explains why his benefactions to his sons and daughters took the form of legacies rather than of devises, and that the only specific devise he made was that of a life estate to his wife, leaving to his heirs a reversion rather than a remainder or remainders. The writer is prevailed upon to think that he intended so to do, both by the circumstances just mentioned and by the fact that the legacy to one of his daughters is but half that to each of her sisters, because of the fact, mentioned in the will, that she had already received \$250, which was to be deducted from the sum bequeathed to her. First, the two sons were to have legacies of \$500 each; then, the remainder (residue) of the estate was to be divided between the sons and daughters equally, deducting \$250 from the share of Helen. Manifestly, this scheme could not have been carried out, and, in his circumstances, the testator could not have anticipated that it could be so, without the sale of the estate. This situation was without doubt sufficient to charge the first two legacies as liens upon the land, and I think the others also. 2 Jarman, Wills (6th ed.), *1409 *et seq.*

If the foregoing reasoning is sound, the word "devise" was not used in the will in its technical or legal sense, but as synonymous with "give" and "bequeath." As illustrating my idea, if the demise of the life tenant had immediately succeeded that of the testator, the reversioners would

have at once succeeded, as tenants in common, to the possession of the estate, charged with a trust, first, for the payment of the debts of the testator; second, for the payment of the two legacies of \$500 each to his sons; and third, for the division of the residue equally between all of his sons and daughters, deducting the advancement to Helen. It is possible that some adjustment might have been made with the latter, and that some means might have been discovered by which the debts and specific legacies could have been discharged, and, if such an event could be supposed to have been contemplated by the testator, the sons and daughters might be regarded as remaindermen rather than reversioners; but, in my opinion, such an event cannot reasonably be supposed to have been anticipated nor therefore intended by him. But, if the estate expectant upon the termination of the life tenancy should be regarded as a technical remainder instead of one of inheritance—as, correctly and precisely speaking, it perhaps ought to be—the limitation over would be subject to the same trusts and charges above mentioned, and the consequences would be the same as under the former supposition. In either view, a title in fee vested upon the death of the ancestor in the persons who then became his sole heirs at law, and the distinction just adverted to is without practical importance. In any event, that to which the testator intended that his sons and daughters should succeed in common was a residue of his estate to be left after the payment of his debts and the specific legacies. The deed from the testator to his wife was made for the sole purpose, expressed upon its face, of insuring the due observance of the will, and was therefore testamentary in character, and is also of no practical significance. The deed of August 29 by the heirs to their mother was, as is stated in the former opinion, evidently made for the sole purpose of enabling her to obtain a new loan for the satisfaction of the \$3,500 mortgage executed by the testator. Nothing seems to have been said or done at the time of its execution indicating an intent by any

of the grantors to release his interest as devisee or legatee in the estate, and there is no reason to suppose that, if nothing more had been done, the present defendant, John H. Anthes, would have considered himself deprived by the transaction of his specific legacy of \$500, which had precedence of all the other beneficences of the will except the life estate, and except a like legacy to his brother. It cannot be doubted, I think, that the mother by this means obtained, and for the ensuing seven years retained, the legal title, subject to the trusts created by the will. The deeds from the husbands of the respective daughters were merely intended to fortify the legal title, and evidently were not supposed to affect the fiduciary character of the grantee.

When in 1895, after the sale to Peterson, it was desired, both by the purchaser and by the widow and heirs, to obtain new loans, and objections to the title were made by the loan agent, it is clear that the new deeds then made were executed, not upon any new consideration, or for the purpose of conveying any title or interest which the grantors did not suppose they had parted with when they executed the former instruments. In other words, the deeds of October, 1895, were not intended to be deeds of conveyance, but of confirmation, and the trust character of the legal title in the mother was not thereby affected. That John H. Anthes so understood the situation is evident, both from the circumstances attending the transaction, and from his subsequent conversations in which he consulted with his brother and sisters relative to the sale of the residue of the land to the Challbergs, and in which he talked about their respective "shares" and the desire of his mother that something should be abated from each to make up a purse for her support during the remainder of her life. The relations between the parties were in the highest degree confidential, calling for the exercise of the uttermost good faith, and none of them was ignorant of any material fact or circumstance. That John H. knew that the mother had no beneficial interest in the land ex-

cept her life estate, and that she held the legal title upon the trusts mentioned, is beyond doubt. Nor can it be doubted that, if his mother had died in the trust, he would have been among the first to demand an enforcement of his lien for the satisfaction of his "share." The deed from the mother to him, although expressly for \$9,600, was without any real consideration, and was evidently made solely for the purposes of effecting a confirmation of the title of Peterson, and of facilitating the sale to the Challbergs. The fact that his brother and sisters acquiesced in these transactions is, under the circumstances, no evidence that they intended to waive or release their pecuniary interests in the estate, which by the recent rise in prices had become valuable. John H. having acquired the nominal title to a trust estate with knowledge of the trust, and, moreover, while occupying a confidential relation toward it and the *cestuis que trustent*, is presumed to have intended to take subject to it; and this presumption cannot be rebutted without evidence or by such as is, to say the most of it, vague and ambiguous. Much of it that came from his own mouth is distinctly confirmatory of the trust, which he seems never to have shown a disposition to repudiate by word or deed until he was called upon for an account of his stewardship, shortly before the beginning of this action.

The parties are all agreed that the title of the Challbergs, as well as that of Peterson, shall remain undisturbed by the final decree, and that the title of both shall be affirmed upon payment by the former of the price stipulated in the contract of purchase, and that a final accounting between the parties and a distribution of the fund shall be adjudged. This agreement should, of course, be respected. If either of the life tenants has during incumbency satisfied, out of means not derived from the body of the estate, debts of the testator charged as liens thereon, he or she will be entitled, upon the accounting, to reimbursement, in accordance with the rule announced by this court in *Tindall v. Peterson*, 71 Neb. 166.

It is recommended that the former decision of this court be vacated and set aside, and that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be vacated and set aside, and that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed March 8, 1905. *Motion denied:*

PER CURIAM: The very earnest and quite able brief of the appellees on their motion for rehearing discusses the proposition as though the will were a devise of lands to the parties named. The opinion of the commissioner upon the second hearing construes the will to direct a sale of the land and a distribution of the proceeds. If this is the proper construction of the will the statute of frauds has no application. It is considered that all parties acquiesced in the long delay because of the unfavorable conditions for selling real estate which obtained for a large portion of the time at least, and that the final sale to Peterson and the Challbergs was a consummation of the provisions of the will acquiesced in by all parties. It is insisted in the brief upon the motion that the labor and good management of Henry Anthes had much to do with creating the values realized upon the sale of the land, and that the disposition of the case will deprive him of fair compensation for his services; and also that the widow will be deprived of her life interest, but there seems to be no ground for this apprehension, as in stating account the trial court

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can hear the evidence and do complete justice to all the parties.

It is also insisted that the condition of the pleadings is such that this disposition of the case is not justifiable. The pleadings are not entirely satisfactory. Upon another hearing they can be amended, if found necessary. We think the facts pleaded show that the plaintiffs are entitled to the relief indicated in the opinion.

The motion for rehearing is

OVERRULED.

MARTHA J. SHOEMAKER V. COMMERCIAL UNION ASSURANCE
COMPANY, LIMITED, OF LONDON.

FILED NOVEMBER 16, 1904. No. 13,638.

Pleading: DEPARTURE. An amended petition which is no more than a restatement of the *gravamen* of the charge in the former pleading is not a departure, although the petition sounded in tort and the amendment avers a contract liability only.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

George A. Adams and Lamb & Wurzburg, for plaintiff in error.

Ricketts & Ricketts, contra.

AMES, C.

A former decision in this controversy may be found in 63 Neb. 173. After the judgment of reversal there pronounced, and after the return of the cause to the district court by mandate, the plaintiff abandoned her suit against all the defendants except the insurance company, against which she filed an amended petition in which she alleged that said defendant on the 5th day of January, 1895,

agreed to insure the property described in the former pleading against loss or damage by fire to the amount of \$1,200, but wrongfully refused, and still refuses, to deliver such policy to the plaintiff, as it had agreed to do. It was further alleged that the building had been destroyed by fire during the agreed term of insurance, and that proofs of loss had been made and furnished to the company, and payment demanded from it, which had been refused.

A general demurrer to this amended petition was sustained upon the ground that it states a new cause of action, and one distinct from that set forth in the original petition or the amended petition, upon which the action was formerly tried, and that suit thereon is barred by the statute of limitations.

We think the district court erred. It is true that the earlier pleading, which is set forth at length in the former opinion, was one in some degree sounding in tort, but, as is there stated, the subject matter of the alleged tort was the alleged contract obligation of the insurance company to the plaintiff. In the absence of such obligation there would have existed nothing about which the company could have been accused of conspiring with the other defendants, but, if there was such insurance, the alleged conspiracy would have been ineffectual to avoid it, and no damages would have resulted therefrom, and so it was held that the petition did not state facts constituting a *joint* liability of the defendants. But it was not held, nor could it have been rightfully so, that the facts pleaded were not sufficient to charge the company with a separate contractual liability. The amendment, of which complaint is made, did no more than to eliminate the futile averments of conspiracy. The *gravamen* of the charge, namely, the alleged contract between the insurance company and the plaintiff, and a breach of it, is the residuum of the former pleading after the completion of the process of precipitation, and is in no sense a departure, or the introduction of a new subject of litigation. It is therefore

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recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE M. LODGE V. FRANCES S. FITCH.

FILED NOVEMBER 16, 1904. No. 13,014.

1. **Advancements.** To constitute an advancement as defined in section 37, chapter 23, Compiled Statutes, 1903, it is necessary either that the ancestor express in the gift or grant his intention that it be an advancement, or that he charge it in writing as an advancement, or that the child or other descendant acknowledge in writing the gift or grant as an advancement.
2. ———. A debt from an heir to an ancestor may be converted by the ancestor, with the consent of the heir, into an advancement, but when such debt is evidenced by note or bond this fact raises a strong presumption that the transaction was intended as a loan and not as an advancement.
3. **Evidenced examined,** and *held* insufficient to show that a promissory note executed by a daughter and her husband to the father was intended as an advancement.

ERROR to the district court for Wayne county: JOHN F. BOYD, JUDGE. *Affirmed.*

Frank M. Northrop and M. D. Tyler, for plaintiff in error.

A. A. Welch, contra.

OLDHAM, C.

This is an action on a promissory note executed by George M. Lodge and his wife, N. S. Lodge, to Nathaniel

Smith, the father of Mrs. Lodge. The note was indorsed for collection by the payee to the plaintiff in this cause of action. The answer in the court below is that the money received upon the note sued on was paid and received as an advancement by Nathaniel Smith to his daughter, Mrs. Lodge. Mrs. Lodge had departed this life before the institution of the suit, and for that reason was not made a party defendant in the court below. The case, by agreement of parties, was submitted to the court, without the intervention of a jury, and a judgment and finding were entered in favor of plaintiff, and defendant brings error to this court.

There is little disputed testimony in the record, and the controversy arises as to the sufficiency of the evidence to show that the note in suit was given by Nathaniel Smith to his daughter as an advancement. The undisputed facts in the record are that Nathaniel Smith was a retired minister of the gospel at the time the note in suit was executed, was past 80 years of age, and had an estate consisting mostly of money; that he loaned this money to his children, taking notes, with interest reserved, from time to time; that in 1881 the defendant and his wife borrowed \$150 of Mr. Smith, and gave a note to evidence the indebtedness; that in 1882 Mr. Smith insisted on their taking \$500 more of his money. The defendant testifies that they did not need the money at that time, and hesitated to take it, but that Mr. Smith claimed that there was no probability that he would ever want the money during his lifetime. Accordingly, the defendant and his wife executed a note for the \$500, and received the money. Later the note of \$500 and \$150 were both put into one note bearing 7 per cent. interest, and payable to Nathaniel Smith or his administrator 5 years after date. In 1889 the note in controversy was given by request of Mr. Smith, because he had lost or mislaid the former note. The first \$650 note was given in response to a request contained in a letter written by Mr. Smith to his daughter from Geneseo, Illinois, on January 1, 1889. The communica-

tion is quite lengthy, and only the portion of it bearing on the execution of the note need be set forth. This portion is as follows:

"Inclosed in this I will send you a note embracing the other notes, putting the whole interest at 7 per cent. as you only have \$650. I should like to furnish you \$500 or more as soon as Alice (another daughter) pays in on her notes. But I want you to see to it that it is put where it will do you some good. If you have to, invest in the savings bank note. The bank here only allows four per cent. paid, sincerely that would be better than nothing. In my will I have not designated anything to the mission boards of the Congregational church, the foreign and home boards, but I thought I could do better for the children and just as well for the boards by requesting them to give one per cent. of their inheritances to the boards after I am gone. By doing this annually they would remember their legacy, and from whence it was derived. I have written to Frances (another daughter) about this. She acquiesced in it. I shall write to all on this point and wish your reply. I thought if seven per cent. could be paid while I am here, one per cent. could be easier done after I am away. What a pity Leander has so much money. He cannot find any place for a home. You and Mr. Lodge can sign this note and return it, and I will send these (the former notes) marked paid. I remain, Your father, Nathaniel Smith."

On the 9th day of January, 1889, Mr. Smith directed a communication to the defendant George M. Lodge, concerning the note in controversy, as follows:

"Yours postmarked the 7th was received here the 8th, enclosing note. The note was signed all right, but what has become of it is more than I can tell. I have hunted my room all over. It seems I must have been very careless. It is one of the greatest mysteries I have ever tried to understand. So, I have concluded to write another note for you to sign. I know it is asking for a great deal of credulity from others, but if that note is found I will send it to you, signed, paid by duplicate, and you can keep this

letter as good testimony in the case. I do not see but that I shall have to give in that my memory is failing. P. S. You will understand that the notes I have taken of children for money loaned will be considered as so much cash, and will at my death be returned to you in the room of so much cash. This is to save you the necessity of sending the money to pay them and having it returned to you again. I shall endeavor to even up the inheritances as soon and as far as possible. My funds are now in the hands of my children except \$1100. I am trying to get things in a satisfactory condition to leave."

At the time of the suit on this note Mr. Smith was still living at the age of 92 years, and gave a deposition which consisted mostly of categorical answers to direct questions propounded to him. After answering the interrogatories that he had indorsed the note to the plaintiff for collection, in answer to the question, "For what was that note given by Mr. and Mrs. Lodge?" he answered, "For money that I had loaned to them." In answer to the interrogatory, "State whether the money for which this note was given was an advancement or gift from you to your daughter Mrs. Lodge, or was intended as such," he answered, "It was not intended as a gift or advancement." In answer to the interrogatory, "State whether or not you ever made an advancement to your daughter Mrs. Lodge, or to any other children of yours," he answered, "I made no advancements or gift to any of my children. I made loans to them, but no gift." This constitutes all the material testimony contained in the record touching on the question at issue.

Section 37, chapter 23, Compiled Statutes, 1903 (Annotated Statutes, 4937), provides: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." Under this section of the statute, the essential elements of an advancement are, first, that they

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are expressed in the gift or grant to be made as such; or, second, that they are charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. Now, it seems clear from the testimony before set forth that the original delivery of the \$150 and \$500, for which the note in suit was subsequently given, was never expressed in any gift or grant to have been intended as an advancement, nor can we, by any fair interpretation of the letters to either Mr. or Mrs. Lodge, say that either of these letters contained a charge in writing made by the intestate against the share of Mrs. Lodge in his estate for the amount of the note; nor is there any written acknowledgment from Mrs. Lodge of the receipt of this \$650 as an advancement. In fact, the ancestor was not dead at the time the suit was instituted, nor is there any evidence as to whether he had or had not disposed of his estate by will. While it is true, as contended by counsel for defendant, that a loan from an ancestor to an heir may be converted by the ancestor into an advancement, yet to establish this fact it must be made to clearly appear that the ancestor expressed the intention to change the loan to an advancement, and that the heir acquiesced in the change. *Miller's Appeal*, 40 Pa. St. 57. Neither of these requisites is made to appear from the evidence in the instant case. It is a rule that, where the parent or ancestor receives such evidence of an indebtedness as a bond or a promissory note, the presumption is in favor of the transaction being construed as a debt, and not as an advancement, and, while this presumption is not absolute, it can only be overcome by clear and satisfactory testimony. As said in *Speir v. Speir*, 14 N. J. Eq. 240:

"A charge of the money or chattel advanced by the father to the son, or a memorandum of the fact that the sum advanced was intended as a gift, is received as evidence of the fact. Sometimes a bond or note is taken; but that converts the intended advancement into a debt from the son, unless a memorandum is elsewhere made of its real character."

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It seems clear to us, in conformity with this view, that there is no competent evidence in the record to sustain defendant's theory of an advancement. The money in the first place was not given to defendant's wife, but, when furnished, its delivery was evidenced by a promissory note, bearing interest, payable to the ancestor or his administrator. If the original loan had been intended to have been converted to an advancement, the note would not have provided for its payment to the administrator of the ancestor. This, as well as the testimony of the ancestor, for whatever it is worth, leads us to the conclusion that the evidence sustains the judgment of the trial court, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF MINDEN V. CARL A. VEDENE.

FILED NOVEMBER 16, 1904. No. 13,639.

1. Evidence examined, and held sufficient to sustain the judgment.
2. Held not error to permit the plaintiff, although crippled, to walk to the witness stand in the presence of the jury.
3. Trial: INSTRUCTIONS. Where the court has properly instructed on a material issue at the request of either of the litigants, it is not prejudicial to omit any reference to such issue from instructions given on the court's own motion.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

J. L. McPheely, for plaintiff in error.

M. D. King, contra.

OLDHAM, C.

This was an action for personal injuries instituted by the plaintiff in the court below against the defendant city of Minden. The petition alleged, in substance, that plaintiff was injured by falling on a sidewalk in the city of Minden, on the evening of December 6, 1903; that the injuries were caused without any fault on plaintiff's part, but because of the negligence of the city in permitting its sidewalk to be and remain in a dangerous condition a long time previous to the injury. The answer was in substance a general denial and plea of contributory negligence. There was a trial to a jury, and verdict for plaintiff for \$302. Judgment on the verdict, and defendant brings error to this court.

The first alleged error called to our attention in the brief of the city is that the judgment is not sustained by sufficient evidence. An examination of the testimony contained in the bill of exceptions shows that plaintiff introduced evidence tending to establish that the walk in question had been out of repair for about two months previous to the injury complained of; that it was a board walk on one of the principally traveled streets of the village, and at the place of injury contained numerous broken and loose planks; and that plaintiff, while traveling over this walk to his residence in the night time, stepped into a hole in the sidewalk and was thrown down, and, by reason of this accident, sustained a very painful and serious injury to his right ankle. While there was evidence in the record tending to show that plaintiff knew of the defect in the walk before the injury, yet he testified that he was walking at a moderate gait, and that he was unable to see the hole in the walk, on account of the darkness of the night, when the injury occurred. We therefore think that the plaintiff's testimony was sufficient to support the finding that the injury was occasioned alone by defendant's negligence.

It is next urged by the defendant city that, as there was evidence introduced tending to show that plaintiff had

been disabled by a former injury, which rendered him a partial cripple, he should, in view of this fact and the fact of his general knowledge of the dangerous condition of the walk, have traveled with extra care and caution on the defective street. Without expressing any opinion as to the soundness of this contention, it is sufficient to say, for the purposes of the case at bar, that this proposition was given to the jury in two instructions requested by the defendant, so that the jury must have found as a matter of fact, from the testimony, that plaintiff was using extra care and caution in traveling the street when the injury occurred.

It is further urged by the city that the court erred in permitting defendant to walk before the jury in his crippled condition, as such a spectacle was calculated to arouse the sympathy and passions of the jury. In the first place, we might say that the very meager quantum of damages awarded shows conclusively that the prejudice and passions of the jury were not visibly affected by plaintiff's walking in their presence; and, again, as plaintiff was a necessary witness in his own behalf; we do not see how he could well have proceeded to the witness stand without walking in the presence of the jury, unless he had been carried before it on a stretcher, which other exhibition might have had a stronger tendency to arouse sympathy and passion than the manner in which the plaintiff did approach the witness stand.

It is urged that the court erred in not instructing the jury, on its own motion, that the burden was upon the plaintiff to establish, by a preponderance of the evidence, each of the material allegations of his petition. This complaint is based on the assertion that an instruction given by the trial court, on its own motion, has much greater effect than one given at the request of counsel for either of the litigants. As all instructions given by the court are of and from the court, we are unable to concede that the jury is, or should be, more influenced by those given on the court's own motion than those given at the request of either of the litigants. In the case at bar, at the request

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of defendant city, the court had given 7 instructions placing the burden of proof upon the plaintiff, not only generally, but specifically, to establish by a preponderance of the evidence each of the allegations in the petition. Having done this, we cannot see how he could have strengthened this proposition by giving a general instruction of his own covering the same question.

We have examined all of the instructions given by the trial court, most of which were requested by the defendant city, and are satisfied that the jury were instructed as favorably to defendant's contention as the law would permit, and as there is no complaint of the action of the trial court, either in the admission or exclusion of testimony, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALVIN M. MILLER V. WILLIAM H. WALKER.

FILED NOVEMBER 16, 1904. No. 13,640.

Appeal: DISMISSAL. A judgment of the district court dismissing an appeal from the county court examined and approved.

ERROR to the district court for Scott's Bluff county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

W. G. Simonson, for plaintiff in error.

Wright & Wright, contra.

OLDHAM, C.

This was a suit on the justice's side of the county court of Scott's Bluff county, instituted by plaintiff in the court

below to recover \$74.10, alleged to have been due on account. The cause was heard in the county court on June 16, 1903, and judgment rendered in favor of plaintiff for the amount claimed. On June 25, 1903, defendant in the court below filed his appeal bond. On July 17, 1903, a transcript of the proceedings of the county court was filed with the clerk of the district court for Scott's Bluff county. At the following term of the district court, plaintiff's attorneys filed a motion in the district court to dismiss the appeal, because the transcript was not filed within 30 days from the rendition of the judgment in the lower court. This motion was sustained by the district court and defendant brings error to this court.

The only excuse offered for the failure to file the transcript within the time prescribed by section 1008 of the code is the claim of defendant's attorney that he was misled as to when the trains left from Alliance to Gering, and that this mistake prevented him from tendering the fees, and having the transcript filed within the time prescribed by statute. It is useless to say that this excuse is legally no excuse at all, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**WESTERN TRAVELERS ACCIDENT ASSOCIATION v. ISABELLE
MCHENRY TOMSON, ADMINISTRATRIX.***

FILED NOVEMBER 16, 1904. No. 13,546.

1. **Pleading: ANSWER.** A defendant may set forth in his answer as many grounds of defense as he may have, subject only to the requirement that such defenses shall not be so repugnant that if one be true the other is false.

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2. ———: ———. Where an answer pleads a failure to give notice, and a reply pleads a waiver and estoppel, or matter to avoid the effect of failure to give notice, the allegation that no notice was given must be treated as admitted. *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, followed.
3. ———: **WAIVER**. Where the pleadings admit that no notice was given and rely upon a waiver or estoppel by the insurer, the question of excuse or of whether notice was given within a reasonable time is entirely eliminated, and the only question left for consideration is whether by its actions the insurer waived the provisions as to notice.
4. **Evidence examined, and held** that no waiver has been proved.
5. **Defenses: CONSISTENCY**. Where the insurer denies that the policy was in force at the time of the loss, a defense which is based upon the conditions of the policy, such as that proofs of loss were not furnished in accordance therewith, is inconsistent with another defense which asserts that no policy was in force at the time of the loss.
6. **Insurance Policy, Action on: PLEADING: WAIVER**. In an action upon an accident insurance policy, where no notice of the accident was given within the time limited by the by-laws of the association, a denial of liability for the reason that no accident occurred, made after this time had expired, is not a waiver of such a provision specifying that no claim for injuries shall be valid unless written notice of the accident shall have been given within 15 days from the happening thereof.
7. **Pleading: AMENDMENT BY INTERLINEATION**. The practice of amending pleadings by interlineation or erasure is not to be commended, and should not be favored.

ERROR to the district court for Lancaster county: **ALBERT J. CORNISH, JUDGE**. *Reversed*.

O'Neill & Gilbert and T. J. Doyle, for plaintiff in error.

L. O. Burr, contra.

LETTON, C.

The plaintiff in error, defendant below, is a mutual fraternal beneficial association, organized under the laws in this state, and having its place of business in the

* Rehearing allowed. See opinions, pp. 674, 680, *post*.

city of Omaha. Its purpose is to furnish indemnity on account of death or disability resulting from injuries received from accidental means. The plaintiff below was Hays B. Tomson, now deceased. The action is now revived in the name of Isabelle McHenry Tomson, as administratrix of her deceased husband's estate. Tomson became a member of the defendant association in 1893, and was a member in good standing at the time of the occurrence of the accident or sickness by reason of which he claimed the association became liable to him upon said certificate. On February 18, 1902, in the usual conduct of his business as a traveling salesman, Tomson was driven in a two-horse buggy by a young man, from Weston, in Saunders county, to Bruno, in Butler county, in this state. At one point in the road, it is claimed that the horses were about to run away and the buggy was drawn rapidly over a very rough piece of road; that he was thereby shaken and jostled violently about in the buggy; that a blood vessel of his brain was ruptured, causing a slight hemorrhage from which he then suffered; that a few days afterwards, at his home in Lincoln, the hemorrhage was repeated, causing paralysis of one side of his body and bringing on a permanent total disability. He sought to recover from the defendant association upon the ground that the injury he suffered was accidentally produced and that therefore he was entitled to the benefits specified in his contract of membership. A trial was had and judgment rendered in his favor in the district court, from whence the association has prosecuted error to this court.

Plaintiff in error argues in its brief, first, that notice of the alleged accident was not given nor waived; second, that the defendant was entitled to judgment under the pleadings; third, that Tomson was not totally disabled for a period of two years or over, and therefore was not entitled to the \$2,500 benefit allowed him by the jury; fourth, error in the introduction of evidence, and, fifth, that the evidence was not sufficient to support the ver-

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dict. The greater part of the argument has been devoted to the question of notice. To determine this question will require an examination of the pleadings.

The petition alleged that Hays B. Tomson became a member of the defendant association in 1893, and that in that year it issued to him its benefit certificate whereby he became entitled to the indemnity afforded by its provisions against accident, and that he had paid each and every assessment made against him from that time, and has kept and performed all of the terms and conditions of said membership certificate or policy on his part to be kept and performed. The petition sets forth further in detail the accident by which he claims he was permanently injured on the 18th day of February, 1902, and further pleads that on the 18th day of February, 1902, he notified the defendant company of said accident, and also upon the 25th of February, 1902, and in March, 1902, he again notified the company of the accident; that it denied liability and claimed that plaintiff was not injured by an accident at all, and thereby waived the provisions of the constitution and by-laws of the association as to notice of the accident, and it is estopped to claim every advantage therefrom. The answer, omitting certain objections to jurisdiction set forth therein, admits that the association executed a certificate of membership to the plaintiff in 1893, alleges that plaintiff has at no time given it notice of any accident, and denies each and every allegation contained in the petition and not hereinbefore admitted. After this answer was filed, two amendments were made by leave of court, admitting that the plaintiff had a hemorrhage of the brain, but alleging that the hemorrhage was caused by disease and that the defendant was not liable on account of said hemorrhage, admitting also that the plaintiff was totally disabled and unable to perform any of the duties pertaining to his usual occupation for a period of one year, beginning on the 22d day of February, 1902; and after the trial was begun, in order to avoid any question as to the issue of membership, a

further amendment was made by leave of court admitting that at the date of the alleged injury the plaintiff was a member in good standing in the defendant association. The reply was a general denial, with the further allegation that after receiving the notice and claim of the plaintiff the executive board of defendant duly met, and the plaintiff's notice and claim of accident came before it for consideration of allowance or rejection, and the same was rejected by a unanimous vote of said board; that defendant denies that plaintiff was injured by an accident, and that defendant is estopped to claim and has waived the provisions of the by-laws and constitution as to notice.

The proof showed that up to the time that Tomson started upon the drive mentioned, he had been a stout, healthy man. He was 54 years of age and testifies he had never had a doctor in his life that he remembered of; that the road at one point had been frozen and thawed, had been cut up by the wheels of wagons while soft, and had frozen again while in this rough condition; that when they reached this rough ground, the horses were on a dead run and about to get away from the driver. He further testifies that in going over the rough ground he was thrown backward and forward, from one side to the other, and while going over it, it felt to him as if some one had turned a mirror in his eyes and he could hardly see any thing the balance of the afternoon; that it was just a perfect glitter all that afternoon and clear up to the next day and that he was prostrated and nervous; that when they reached Prague, the first town after going over the rough ground, he was feeling dizzy and that he had a colored sensation in front of his eyes and could scarcely see, and that he had the same restless feeling and snappy feeling in front of his eyes all the time until after his return home a day or two afterwards.

The testimony further shows that at his home he was stooping over to take something out of the lower drawer of a chiffonier, when he became dizzy and faint and had

an apoplectic stroke which disabled him entirely for a year. The drive took place on the 18th of February, and the second attack upon February 22. Upon April 8 a letter was written to Arthur L. Sheetz, the secretary of the association, by Hays Tomson, Jr., the son of defendant in error, the following portion of which is in evidence: "Dear Sir,—My Father who is a member of the W. T. A. A. has been very sick for the last six weeks and I write to ask if he is eligible for insurance. He made a drive from Weston to Prague, a distance of about forty miles, with the snow on the ground, behind a pair of bronchos on Monday or Tuesday. From that time on his eyes kept continually blurring and he felt sick until Saturday evening when he lost control of his arms and legs. * * * Hoping to hear from you, I remain, Hays Tomson, Jr."

On April 9 the association replied to this letter as follows: "Mr. Hays Tomson, Jr., 431 South 12th St., Lincoln, Nebraska. Dear Sir: Your letter without date with reference to your father's illness is at hand. In reply will state that you do not mention any accident which your father had, and the association pays only where the disability is caused by accidental injuries. The clause requiring notice to be given within 15 days after the accident applies in all cases where it is possible to give such notice. However, since there seems to have been no accident in this case this question would not be of importance, however, as above stated the association does not pay indemnity for disability except such disability as may have been caused by reason of accidental injuries. Yours truly, Arthur L. Sheetz, Secy."

On April 22 Mrs. Tomson wrote the association as follows: "Lincoln, April 22, 1902. Mr. Arthur L. Sheetz, Omaha, Nebr., Dear Sir: When my husband Hays B. Tomson, left Malmo, February 18, he was perfectly well. He made a drive over very rough frozen roads of 25 or 30 miles. The driver made rapid time and the jarring was violent and severe. It is his belief that this 'shaking up' caused the hemorrhage

which resulted in the complete disability following and which still continues. He has been unable to send you notice because his physician, Dr. Mitchell, has required as nearly complete mental and physical quiet as possible. Very sincerely, Isabelle Tomson, 431 South 12th St."

On May 6 the association made the following reply: "May 6th, 1902. Mrs. Tomson, 431 South 12th St., Lincoln, Neb. Dear Madam: Your letter of April 22d has been referred to our executive board and I am instructed to advise you that as Mr. Tomson met with no accident which caused his recent disability he is not entitled to any benefits from the association. Your letter does not say that any accident happened unless the fact that Mr. Tomson rode over a rough and frozen road could be classed as an accident. If it is insisted that this is an accident we will be obliged to also rely upon failure to give the required notice of the accident within 15 days. We believe that by no fair construction of our by-laws could Mr. Tomson's disability be held to be the result of any accidental injuries. While we sympathize with you and Mr. Tomson in this misfortune we regret that the disability is not such as is contemplated by our constitution and by-laws. Yours truly, Arthur L. Sheetz, Sec'y."

The records of the executive board show, under date of April 26, "It was moved and seconded that the claim of H. B. Tomson, Lincoln, Nebraska, be rejected. The motion was carried by unanimous vote." The constitution and by-laws of the association provide that no claim for injuries received shall be valid unless written notice of said accident shall have been received at the office of the association within 15 days from the happening thereof.

It will be seen that no notice of any accident was given to the association within 15 days as is required by these provisions. It may further be noted that nothing is alleged in the petition or reply which sets forth any reason or excuse why notice was not given within the 15 days. No attack is made by defendant in error in the pleadings upon the reasonableness of this requirement, but it is

claimed that by its actions the association waived the limit of time, and also waived any further or more specific proofs and notice of loss than those contained in the letters hereinbefore set forth.

The defendant in error relies upon the doctrine laid down in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, and subsequent cases following and adopting the rule that, where the insurer denies all liability for the loss and refuses to pay the same upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice. The reason given for this rule, however, is that since the insurer denies that the policy was in force at the time of the loss, a defense which is based upon the conditions of the policy, such as that proofs of loss were not furnished, is utterly inconsistent with another defense which asserts that no policy was in force at that time. Plainly, the insurer can take no advantage of the provisions of a contract which he claims does not exist. The cases following the *Dierks* case rest upon this principle of the defenses being inconsistent, because in each case the insurance company claimed that the policy was not in force at the time of the loss. In the instant case no claim is made that the certificate was not in force at the time of the loss. Defendant in error argues that the pleadings, up to the time of the amendment in open court, denied that Tomson was a member of the association, but we do not thus regard them and think that that issue was not raised. The allegations of the answer, taken as a whole, do not deny membership. The question then arises whether a defense that no notice was given within the time limited and a defense that no accident ever happened are inconsistent with each other. We think they are not. Under section 100 of the code, the defendant may set forth in his answer as many grounds of defense as he may have. In *Home Fire Ins. Co. v. Decker*, 55 Neb. 346, which was an action against a fire insurance company upon a policy, the petition admitted that proofs of loss had not been

furnished, but alleged that the condition in relation thereto had been waived. The first paragraph of the answer denied generally the allegation of the petition, the second alleged that the plaintiff had not complied with the conditions of the policy as to notice and proofs of loss; the third, that proofs of loss were not furnished within the time limited in the contract; and fourth, that the plaintiff caused the building to be burned. This court said (SULLIVAN, J.):

"We entirely agree with counsel that the several grounds of defense stated in the answer were not inconsistent. The proof of one would have no tendency whatever to disprove either of the others. A defendant may, under our system of pleading, allege as many grounds of defense as he may have, subject only to the condition, implied from the requirement in regard to verification, that such defenses shall not be so repugnant that if one be true the other must be false. *Blodgett v. McMurtry*, 39 Neb. 210; *Citizens' Bank v. Closson*, 29 Ohio St. 78; *Pavey v. Pavey*, 30 Ohio St. 600; *Nelson v. Brodhack*, 44 Mo. 596; *McAdow v. Ross*, 53 Mo. 199."

A defense of failure to give notice within the time limited, and a defense that no accident occurred, are not inconsistent with each other. The proof of one would in nowise affect the proof of the other. They may both be true or only one of them may be true. The facts in this case therefore do not fall within the rule established in the *Dierks* case, *supra*. When an insurer, before the time for giving notice expires, absolutely denies liability upon a policy, there is reason for the rule that a denial of all liability on the policy waives the giving of notice. The law does not require a vain thing; hence, where the insurer knows of the loss and denies all liability before the time of giving notice expires, the giving of notice or of proofs of loss would be useless. This rule, however, cannot apply where nothing has been done by the insured to render the giving of notice a useless action before the time has expired in which notice is required to be given.

While the petition alleges the giving of notice to the defendant through its vice-president within 15 days' limit, no proof of this was introduced at the trial. The only notice of any kind received by the company therefore was the two letters hereinbefore set forth. The answer denies the receipt of notice. The reply denies generally the allegations of the answer, and sets forth facts by which it is alleged the defendant "did waive and forego all the provisions of the policy, by-laws and constitution in respect to notice and is estopped to claim any advantage therefrom."

Under the rule laid down in *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, that any allegation of the answer to which the reply pleaded a waiver and estoppel, or matter to avoid its effect, must be treated as admitted, we think that the pleadings in effect admit the failure to give notice within the time specified and rely upon a waiver or estoppel. As before noted, the pleader does not allege or rely upon the inability of Tomson arising from his injuries to give the required notice; and hence the principles laid down in *Woodmen Accident Ass'n v. Pratt*, 62 Neb. 673, are not applicable. The question presented is not whether the circumstances excuse the giving of notice within the time, but whether, when no notice actually was given within the time, and no excuse is pleaded, the excuse can be considered as being within the issues. In the *Pratt* case, *supra*, the court say:

"We are also cited to the case of *Heywood v. Maine Mutual Accident Ass'n*, 85 Me. 289, 27 Atl. 154, in support of the contention of the defendant. In that case the question arose on demurrer to the petition, which disclosed that notice was required by the terms of the policy sued on, and that none had, according to the pleading, been given, nor was any excuse or reason pleaded for not giving the notice. It being, for the purpose of the question decided, admitted that no notice had been given and no excuse existed for failure to give the notice, the question could not well be decided otherwise."

Since the pleadings, as we construe them, admit that no notice was given, and rely upon a waiver or estoppel by the insurer, the question of excuse or of whether notice was given within a reasonable time is entirely eliminated, and the bare question left for consideration, whether by its actions, the insurer waived the provisions as to notice.

The first letter to the association, which was written by the son, stated, in substance, that his father had been *sick* for six weeks; that he drove 40 miles with snow on the ground, that from that time his eyes kept blurring and he felt sick, until Saturday night, when he lost control of his arms and legs. The association replied to this letter, in substance stating that the writer mentioned no accident. That the 15-day provision applied in all cases where it was possible to give notice; that the association did not pay except for the result of accident. From these letters it is apparent that no notice of accident was given to the association thereby, and that it did not consider or accept the letter as a notice. Further, it expressly stated that the 15-day notice applied in all cases where possible to give it, thus indicating an intention to insist upon the rule. The second letter, written April 22, evidently seeking to set forth in detail the accident claimed, stated the facts and gave a reason and excuse why notice was not given. On April 26 the executive board met, the two letters were evidently treated as a claim for indemnity and the record of the proceedings shows that the claim of Hays B. Tomson was rejected. No reason is assigned for the rejection upon the records, but the letter of May 6 from the secretary to Mrs. Tomson expressly puts the rejection upon the ground that Tomson had met with no accident and that the association also relied upon failure to give notice. A claim envelope was introduced in evidence which showed an indorsement, "Claim of H. B. Tomson," and "Claim filed April 9," and in pencil in the handwriting, apparently, of the secretary, "No Accident." "Rejected." These are all the facts in evidence as to the giving of notice and the alleged waiver. We can see no

waiver here. The association from the first insisted upon notice, and after the second letter was written, which was the first which set forth an extraneous or violent cause for the injury, it disclaimed liability both on account of the fact that there was no accident and further because of lack of notice. We can see no inconsistency in this conduct. It is not a case where the insurer claimed a forfeiture and at the same time acted as if the policy were valid. No question of forfeiture is presented. It treated the certificate as valid, but insisted that nothing had occurred which set its provisions as to indemnity in motion. This is the position it has taken from first to last, both before and after this action was begun. Neither forfeitures nor estoppels are favored in law, so no presumptions are to be indulged in in order to aid either insurer or insured as this case is presented to us. Under these facts neither waiver nor estoppel has been shown as to the provisions of the constitution in regard to notice, and the association has a right to rely upon the terms of the contract.

As has been stated, as the pleadings now stand we cannot consider whether the 15-day requirement is reasonable, nor whether the circumstances offered good and reasonable excuse for the failure to give the notice. The questions presented are not the same as in *Woodmen Accident Ass'n v. Pratt, supra*, and with the rules there enunciated we are content. The trial court instructed the jury that the defendant waived all that part of the policy with respect to formal and technical notice of an accident within 15 days, and that that question should not be considered, which was duly excepted to by defendant. In the view we take of this matter this instruction was prejudicially erroneous.

2. The plaintiff in error claims it was entitled to judgment under the pleadings. This claim is based upon the contention that the reply admitted paragraph 5a of the answer, which charged that Tomson's injury was occasioned by disease and that the association was not liable

on account of the same. In this connection a serious controversy arose between counsel as to whether an interlineation in the reply in fact made this admission. This matter was decided in this court upon a motion to strike a part of the transcript, and since the effect of the ruling upon the motion was to leave the reply denying this allegation, this contention is not well taken.

3. Considerable controversy has arisen in this case by reason of the somewhat confused manner in which amendments to the pleadings were made while the cause was pending in the district court. Oral charges in open court, affidavits and counter-affidavits have been made with reference to the time when certain interlineations and erasures were made. While these facts are not material to a decision of the case, we believe it advisable at this time to criticise this method of making amendments. In this day and age, when the stenographer and typewriter are adjuncts of almost every lawyer's office, there is no excuse for pleadings being interlined and erased, having slips attached to them, or any other like mutilation being made. It often happens that in the hurry of a trial an amendment may be permitted to be made by interlineation, but before the case is finally submitted the parties should be required, if it is possible to do so, to file clear copies of the papers thus amended. In this way much dispute, ill feeling, charges and counter-charges might be dispensed with. The practice of amending pleadings by interlineation or erasure is not to be commended, and should not be favored.

We recommend that the judgment be reversed and the cause remanded.

OLDHAM, C., concurs.

AMES, C., concurs only in the result.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on rehearing was filed May 17, 1905. *Judgment of reversal vacated. Judgment of district court affirmed:*

1. **Pleading: PETITION: REPLY.** A plaintiff may, subject to liability to attack by motion or demurrer, plead in his petition matter in avoidance of an anticipated defense, and may supplement the same in his reply by allegations not inconsistent therewith.
2. ———: **CONSTRUCTION AFTER JUDGMENT.** Pleadings after verdict and judgment will, if not previously attacked, be liberally construed for the purpose of upholding the result reached by the court and jury.
3. ———: **WAIVER.** If an insurance company, sued for an alleged loss, denies the loss, it waives proof of notice of the same.
4. **Action on Insurance Policy: NOTICE.** If an insurance company has actual knowledge of a loss, within the time stipulated in the policy for the giving of formal notice thereof, such notice is dispensed with.

AMES, C.

This case was formerly before this court and decided by an opinion published, *ante*, p. 661. On the former occasion the cause was submitted on briefs without oral argument, but the facts are set forth at length in the opinion and need not to be here repeated. A rehearing was granted, and oral arguments thereon have been had, solely upon the subject of the construction of the pleadings, to which subject the present discussion will for the most part be confined.

At the time of the former decision we were united in opinion that if by the pleadings themselves or by the admissions of fact contained therein, the defendant, plaintiff in error, had waived formal notice of the accident, to obtain indemnity for which the action was brought, the judgment of the district court ought to be affirmed. The petition anticipates that failure to give such notice might, and perhaps would, be relied upon as a defense to the action, and pleads as an excuse therefor total mental and

physical disability as a consequence of and immediately following the accident continuously for a term extending beyond the period within which the notice was by the contract required to be given. But it further alleges that within that period a vice-president of the defendant called upon the plaintiff at his home where the latter was suffering from the disability complained of, "and plaintiff notified said vice-president of said company, and said company of said accident." It is insisted by the defendant that this latter allegation is inconsistent with and in effect a retraction of the former, but we think that such would be a too literal and technical construction. No attack was made upon the petition by motion or otherwise, and it is the settled rule of this court, sanctioned by decisions so numerous that citation of them is not requisite, that after a verdict and judgment, pleadings will be liberally construed for the purpose of upholding the result reached by the court and jury. It is obvious to our minds that what the pleader had in view and intended to allege was that the defendant, by the visit of one of its managing officers within a week after the happening of the accident, and by what the latter learned upon such visit by his observation of and conversation with the plaintiff, became aware and charged with notice and knowledge of the occurrence. It was in substantiation of the allegation as so interpreted that evidence was offered by the plaintiff and admitted on the trial, and we think that it is too late, after verdict, to object that such is not its true meaning. The above mentioned allegation in the preceding paragraph of the petition is in the following language:

That the accident "caused a hemorrhage of the brain, causing complete disability of the plaintiff, and from the effects thereof plaintiff became totally disabled, mentally and physically, helpless and nearly blind; was confined to his bed for nearly six months, and wholly unable to work, travel, or perform his business, or to personally visit or notify said company at Omaha, Nebraska."

We think these two allegations, the one following immediately after the other, ought, at any rate after verdict, to be considered and construed together, and to be held to charge, in effect, that the plaintiff was disabled by the accident from giving formal notice within the 15 days stipulated in the contract, but that within that time the defendant became fully aware of it by means of the visit of its vice-president.

The petition further alleges that after the visit of the vice-president, and on an unspecified day in March, the plaintiff notified the company of the accident and demanded indemnity therefor, but that in response "to said several notices" the defendant "denied that it was liable therefor and claimed that the plaintiff was not injured by accident at all, and thereby waived and did forego all that certain portion" of the contract, "in respect to formal and technical notice and of any notice at all of said accident and is now concluded and estopped to claim any benefit or advantage thereof as to notice of any kind in these premises." The evidence shows that the pleader was mistaken as to the date of this latter mentioned notice, and that the notice referred to was the letter of the son of the insured written to the secretary of the association under date of April 8, 1902, long after the expiration of the 15-day limit. There was therefore no intentional repugnancy between this last allegation and either of the preceding. There was no motion to make more definite and certain, and it is evident that both parties interpreted the allegation as a sufficient designation of the letter disclosed in the proofs. The reply of the secretary of the association to this letter fully sustains the petition. It explicitly denies that the insured had been injured by accident, and while calling attention to the requirement of notice within 15 days, remarks that because of the absence of accident, that feature "would not be of importance."

The answer admits that the plaintiff was suffering from the malady described in the petition, but alleges that the

same was due to disease, and not to accident, and alleges "that plaintiff has at no time given notice of any accident or accidental injury as required by said constitution and by-laws and by the contract between plaintiff and defendant." The reply avers that on or about the 26th day of April, 1902, the defendant, by a formal vote of its board of directors, "denied that plaintiff was injured by an accident; denied that defendant was liable to plaintiff for or on account of accident, well knowing of plaintiff's claim and of plaintiff's notice of same to defendant, and the defendant did thereby waive and forego all provisions of the by-laws and stipulations of the contract with reference to notice," and "is now estopped to claim any benefit or advantage thereof as to notice of any kind in the premises."

Upon mature consideration, after listening to oral argument, we are convinced that there is no necessary repugnancy between the reply and the matter above quoted from the petition. If it is true, as said in the former opinion, that there is no inconsistency between a denial of notice and a denial of the existence of anything of which notice could have been given, it is equally true that there is no serious conflict between an allegation that notice was waived and an allegation that there were circumstances within the knowledge of the parties which rendered a notice not requisite. The petition admitted in effect that a formal written notice, such as was contemplated and in most cases required by the contract, had not been given within the time specified therein, but it pleaded two excuses for the failure, or, at least, one excuse and one circumstance which rendered the formal notice not indispensable, to wit: First, that the plaintiff was disabled from giving the notice by the nature, gravity and duration of his injury, and second, that within the time limited by the contract for giving the notice, the defendant, through the visit and conversations of one of its managing officers, had an acquaintance with the precise facts, knowledge of which the notice, when given,

was designed to impart. Now, if these allegations are true, they are in no degree inconsistent with the claim that when some months later the plaintiff made a demand upon the association for indemnity, the latter regarded the question of notice, as its secretary had previously expressed it, as "not to be of importance," because, "as above stated, the association does not pay indemnity for disability except such disability as may have been caused by reason of accidental injuries," and "there seems to have been no accident in this case." Whether the reply strengthened in any degree the case made by the petition, may be doubted. The transactions of the 26th of April pleaded by it, and established by the evidence, would have been more accurately described as treating a formal notice as already waived than as constituting in themselves a waiver of one, and it is not unlikely that they might have been proved as an admission to that effect without having been especially pleaded; but however that may be, neither the pleading nor the proof of them was inconsistent with the allegations of the petition. It was held by this court in *German Ins. Co. v. Shader*, 68 Neb. 1, that it is competent for the plaintiff to anticipate a defense and plead waiver (or matter of avoidance) in his petition. This the plaintiff did, and the allegations of the reply, which the former opinion regards as an admission that no notice was given, now appear to us to be merely supplemental to and corroborative of the petition. If this view is correct, the decision in *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, cited in the former opinion, is not in point. *German Ins. Co. v. Shader, supra*, is authority for holding that a petition and reply, in so far as they treat of the same matter, are to be construed together, and under the liberal rule above adverted to they will not be treated as in conflict with each other unless necessarily so. It does not appear that there is any necessary inconsistency in the instance under discussion.

The facts stated in the former opinion, and established

by practically undisputed evidence, are, we think, conclusive to the following effect: That within a week after the plaintiff received his injury he was visited by one of the managing officers of the defendant, and that through the latter the defendant then acquired a knowledge of the nature of the plaintiff's disability and the circumstances of its cause, or at least origin; that within about six weeks afterwards a son of the plaintiff called the matter to the attention of the defendant's secretary, by the letter of April 8, and was promptly rebuffed by the latter by an emphatic denial and repudiation of the claim that the plaintiff's disability was due to accident; and that such denial was treated as the sole ground for the rejection of the claim by the formal action of the board of directors on the 26th of the same month. The answer admits that "plaintiff was totally disabled and unable to perform any part of the duties pertaining to his usual occupation for a period of one year, beginning on the 22d day of February, 1902," the second day following the accident. Furthermore, the answer, after having affirmatively alleged that the defendant is excused from payment by section 6, article 8 of its constitution and by-laws, because the disability complained of was due to disease, concludes with the following: "Further answering said petition the defendant denies each and every allegation therein contained not hereinbefore specifically admitted," and the one important allegation of the petition not specifically or otherwise admitted is, that the disability of the plaintiff was due to accident, so that fact is put distinctly in issue.

We conclude, therefore, that the case falls clearly within both of the main principles adopted by this court in *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473: First, that formal notice of loss was immaterial, because the company had actual notice through the presence of its agents at the fire, and acted thereon, though refusing to make payment for that reason; and, second, because the company by its pleading denied liability on the ground that

the property destroyed was incumbered by mortgage at the time of the fire. It can, of course, make no difference with the application of this latter rule whether the issue of nonliability is raised by special allegation or by general denial, or whether the absence of liability is contended to be due to forfeiture, as in the case cited, or to the nonoccurrence of the accident out of which it is alleged to have arisen, as in this case. In either case the plaintiff would be driven to the expense and labor of the trial of an issue that would be wholly immaterial in the absence of liability for want of notice. In short, if this court adheres to the opinion in *Omaha Fire Ins. Co. v. Dierks*, *supra*, the judgment in this case must be affirmed as in harmony therewith; but if that decision is overruled, there must still be an affirmance, because, by the opposite rule for the construction of pleadings, the reply is not inconsistent with the petition, and the undisputed evidence establishes the fact that the defendant repudiated the claim on the ground that there had been no accident.

We are satisfied with the opinion in the case cited, and recommend that it be adhered to and that the former decision of this court in this case be vacated and set aside, and the judgment of the district court affirmed.

OLDHAM, C., concurs.

By the Court: For the reason stated in the foregoing opinion, it is ordered that the former decision of this court be vacated and set aside, and the judgment of the district court

AFFIRMED.

The following opinion on second motion for rehearing was filed October 19, 1905. *Rehearing denied*:

PER CURIAM: The third paragraph of the syllabus appears to be an inaccurate statement of the law. If the insurance company has no notice, express or implied, of any claim of loss until suit is begun therefor, it may un-

Skow v. Locke.

doubtedly answer, both that there was in fact no loss, and that the claimants never gave any notice of the alleged loss pursuant to the terms of the policy. The syllabus is modified accordingly.

The conclusion reached, however, appears to be justified on the grounds fully stated in the opinion, and the motion for rehearing is

OVERRULED.

JAMES J. SKOW v. JOSEPH L. LOCKE.

FILED NOVEMBER 16, 1904. No. 13,625.

Chattel Mortgage: SALE: CONVERSION. A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess. *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61, followed.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Affirmed.*

Sackett & Spafford and *E. O. Kretsinger*, for plaintiff in error.

J. E. Cobbey, contra.

LETTON, C.

This was an action of conversion brought in the district court for Gage county by Joseph L. Locke, defendant in error, as plaintiff, against James J. Skow, plaintiff in error, as defendant. The petition, in substance, alleged that on and prior to the 19th day of March, 1900, the plaintiff was the owner of certain personal property in the petition described; that the property was reasonably worth \$1,500; that on or about the 19th day of March, 1900, the defendant, James J. Skow, unlawfully took and

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illegally and wrongfully converted the same to his own use, to plaintiff's injury and damages in the sum of \$1,500, wherefore plaintiff prays judgment, etc. The defendant answered, pleading a prior adjudication in the district court for Gage county between the same parties for the same property, whereby the ownership and right of possession of the same property was finally adjudicated in favor of the defendant James J. Skow; that the judgment in said case is *res adjudicata*, and the plaintiff is estopped from bringing this action. He further denied generally every allegation in the plaintiff's petition. The reply was a general denial and a special denial of a former adjudication, coupled with a demurrer to the answer. Upon the issues thus made up, the cause was tried to a jury, and verdict and judgment rendered against the defendant therein, James J. Skow.

The evidence shows the following facts: That on the 1st day of June, 1898, Locke executed and delivered to Skow a chattel mortgage upon the property described in the petition to secure an indebtedness of \$1,132. On the 19th day of March, 1900, claiming a default in the conditions of the mortgage, Skow began an action in replevin in the county court of Gage county to obtain possession of a large part of the goods and chattels described therein. This case was tried in the county court, and afterwards appealed to the district court; the trial in that court resulting in a verdict which found that the right of possession of the property in controversy was in Skow at the beginning of the action, and found the value of his special ownership of the property at that time to be \$36.95, and his damages for the detention of the property to be one cent. No motion for a new trial having been filed, a judgment was entered upon this verdict. No proceedings in error were brought and the judgment is final. A few days after this judgment was rendered, this action was commenced. The defendant contends that conversion was not the proper form of action, and that the action should have been for an accounting; that the right of possession

was in him at the time the action was begun and had been so adjudicated, and that the court erred in its instructions to the jury and in the admission of evidence.

1. The court instructed the jury at the request of the plaintiff below as follows: "7. The jury are instructed that the verdict and judgment in the replevin case offered in evidence do not constitute a bar to this action," to which exception was taken; and refused to instruct the jury at the request of the defendant Skow, that if they found that the right to the possession of the property in controversy was adjudicated and found to be in the defendant Skow by the former judgment of the court, then they should find for the defendant upon the items which were in controversy in both cases, to which refusal the defendant excepted. The court, however, further instructed the jury at the plaintiff's request as follows: "5. The court instructs the jury that in this case both parties are bound by the verdict and judgment rendered in the replevin suit testified about, and by the amount found to be due upon the chattel mortgage from Locke to Skow, to wit, \$36.95, and one cent damages. And if the jury believe from the evidence that said defendant Skow took and sold under his said chattel mortgage property more than sufficient to pay the said amount of \$36.95 and one cent damages so due him, together with the reasonable expenses of taking and selling enough property to satisfy his said claim and such expenses, if any such expenses have been proved, then the jury will, from the evidence before them, find the reasonable value of all the property taken under said chattel mortgage at the time taken, and from such amount deduct the said amount of \$36.95 and one cent damages and the amount of such reasonable expenses as above defined, if any such are proved, and find the balance with interest thereon from the date of such sale at the rate of seven per cent. up to the first day of the present term of this court, on September 14, 1903, as the amount due to Locke from defendant Skow upon the property included in said mortgage. And your verdict

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will be for said amount together with any other amount you may find to be due under these instructions and the evidence." Defendant excepted to the giving of this instruction. From the statement of facts recited, it will be seen that at the time alleged in the petition as that upon which the conversion took place, to wit, on or about the 19th day of March, 1900, the plaintiff in error, Skow, was entitled to the possession of the property, and that this right of possession was conclusively established in him by the verdict and judgment of the court. The evidence shows, however, that the value of his special ownership was \$36.95, and that he had in his possession property to the value of several hundreds of dollars belonging to the defendant in error.

In *Omaha Auction & Storage Co. v. Rogers*, 35 Neb., 61, this court held as follows: "A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess." Citing *Charter v. Stevens*, 3 Den. (N. Y.) 33.

The New York case was an action of trover for a horse which the defendant took from the plaintiff's possession under a chattel mortgage. The mortgage had not been fully paid when the property was taken. After the defendant had taken the property, he sold it at auction under the mortgage in several parcels, the horse in question being the last which was sold, and it appeared that before the sale of the horse enough had been raised by the prior sale to pay the balance due on the mortgage with interest and expenses. Defendant insisted that the defendant's title to the property had become absolute at law on account of the nonpayment of the mortgage debt. The trial judge charged the jury that, although the taking of the property was lawful, yet, since at the time of the sale of the horse enough had been realized to satisfy the debt and expenses, such sale was a conversion of the horse; and the supreme court affirmed the case.

It did not appear at the trial of the instant case what particular items of property were first sold by the defendant, or that the provisions of the statute providing for the foreclosure by sale of property covered by chattel mortgages had been complied with. If the evidence had disclosed that the foreclosure proceedings had been had in all respects as provided by law, and if the identity of the property which had been sold before the amount necessary to pay the debt, interest and expenses had been realized had been shown, the instruction complained of would have been erroneous, since it was only the property remaining that defendant could have converted; but when such facts are not shown, then the rule laid down in the instruction is correct, and the defendant will be held to have received market value for the property he sold and applied in payment of the mortgage debt and will only be allowed to deduct the amount of his debt, interest and costs of sale from the market value of the entire property. When the defendant had sold enough property to pay the balance of \$36.95, with interest, and the reasonable expenses of the sale, he had no further right or title to the plaintiff's property, and became a trespasser at once. It was his duty to return the unsold property to the true owner. An appropriation of it to his own use thereafter was a conversion for which an action will lie.

2. As to the former adjudication, it was immaterial in the case, except to settle that the defendant had the right of possession of the property until his special interest in the property, which was ascertained to be \$36.95, was paid. The status of the parties with reference to the right of possession of the property was just the same as if no adjudication had been had and there was still \$36.95 unpaid upon the mortgage debt. The defendant had the right to the possession of the property until the debt was paid and no longer, and this was in effect what was adjudged in the replevin case.

3. We have examined the other assignments of error and find no error prejudicial to the defendant.

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We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

H. K. SMITH V. JAMES G. CORRIGAN.

FILED NOVEMBER 16, 1904. No. 13,630.

Pleadings and evidence examined, and held that instruction complained of was not erroneous.

ERROR to the district court for Buffalo county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

H. M. Sinclair, contra.

LETTON, C.

This action was brought by the plaintiff in error to recover the value of two horses which he alleges the defendant, Corrigan, together with one J. H. Glazier, took in the fall of 1894 to winter in Cherry county, Nebraska; that afterwards the defendant purchased all of Glazier's interest in the business, and in May, 1895, Corrigan returned to him one of his horses, but that he told plaintiff that, while on the way down from Cherry county with a number of horses, the other two belonging to plaintiff had broken away from the bunch, and that as soon as he disposed of the other horses he would go back and get these. That defendant did not try to get the horses, but allowed them to become lost. He asks judgment for their value. The answer was a general denial. A verdict and

judgment in favor of defendant were rendered, and the plaintiff prosecutes error to this court.

The only ground of complaint alleged in the plaintiff's brief is that the trial court's theory of the case was wrong, and that the issues presented to the jury were not in the case. He argues that the plaintiff's right to recover was based upon the failure of Corrigan to perform the promise to go up to Cherry county and get the two horses which had strayed, and that, consequently, the third instruction given by the court which recited, in substance, the allegations of the petition, and instructed the jury that, if the plaintiff had established all of these facts by a preponderance of the evidence, then he was entitled to recover the reasonable value of the horses, but, on the contrary, if he has not so established such facts they should find for defendant, was erroneous, because not properly stating the issue.

The evidence showed that Glazier and Corrigan, in company with each other, took a number of their own horses and horses belonging to others from the neighborhood in which they lived in Buffalo county to Cherry county to winter, feed being scarce in the locality in which they lived. The plaintiff asserts that in this enterprise Glazier and Corrigan were jointly interested, and that his contract was made with them jointly. On the other hand, both Corrigan and Glazier testify that, while they took the horses to Cherry county together and kept them in the same herd upon the range and fed them together, still, that each bunch of horses was branded in a different manner, that each individual hired men to take care of his own part of the stock, and that there was no partnership or joint interest between them; that the contracts each had made with parties in Buffalo county to winter stock were made upon their individual account, and not made in partnership. This evidence was corroborated by other witnesses. Upon this testimony the jury found for the defendant, and it is not claimed that the evidence is not sufficient to sustain the verdict.

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Whatever the intention of the pleader may have been, the record clearly shows that the case was tried upon the theory that the allegations of the petition, that the contract was made jointly with Corrigan and Glazier, that Corrigan afterwards purchased Glazier's interest in the contract, and that Corrigan negligently allowed the horses to stray and become lost, were the material facts required to be proved by the plaintiff in order to recover. If, as is now stated, the intention of the pleader was to base the right to recover upon the failure to perform the promise to go up to Cherry county and get the horses, it is sufficient to say that upon this allegation alone no recovery could be had; such a promise made without consideration by a party upon whom rested no duty or obligation to perform the same being a mere *nudum pactum*. However, it is evident from the pleadings, from the proceedings of counsel in the introduction of testimony and in their objections to the same, from the rulings of the court, and from its instructions to the jury that the case was actually tried by all parties upon the theory that the issue was whether Corrigan and Glazier were joint contractors, as set forth in the petition. This being the fact, no error was made in the instruction complained of, and the case was properly submitted to the jury. We find no error in the record, and recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF BEATRICE V. WILLIAM W. WRIGHT, COUNTY
TREASURER, ET AL.

FILED DECEMBER 7, 1904. No. 13,529.

1. **Statute: VALIDITY.** The constitutional validity of an act of the legislature is to be tested and determined, not by what has been or possibly may be done under it, but by what the law authorizes to be done under and by virtue of its provisions.
2. **Tax Sale: NOTICE.** No notice is required to be given of a sale of real estate for taxes delinquent for a period of over five years, which is to be sold under the provisions of chapter 76, laws of 1903.
3. ———: ———. The fact that no notice of sale is required other than that contained in the act itself does not render it void as taking property without due process of law.
4. **Tax Sale: NOTICE.** The notice given and required under the provisions of the general revenue act, section 193 *et seq.* article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10592), for the sale of real estate for delinquent taxes is not a notice of a sale under the special provisions of said chapter 76, laws of 1903.
5. **Lien of Taxes.** Taxes and special assessments levied on real estate under the general revenue laws of this state create no personal liability against the owner for the payment of which a judgment *in personam* can be obtained. It is the property alone which is assessed that can be resorted to and taken in satisfaction of the taxes levied against the same.
6. ———: **RELEASE.** A release or discharge of the lien of taxes or any portion thereof assessed and levied on real estate operates as a release, discharge and cancelation of such taxes for any and all purposes.
7. **Statute: CONSTITUTIONALITY.** The provisions of the act of the legislature, chapter 76, laws of 1903, examined, considered, and held to be in conflict with section 4, article IX of the constitution, which declares that the legislature shall have no power to release or discharge any person or corporation from their or its proportionate share of taxes, nor shall commutation of such taxes be authorized in any form whatever.

ORIGINAL suit to enjoin defendant, treasurer of Gage county, from selling certain lands for less than the full amount of the taxes levied against them. *Decree for plaintiff.*

M. B. Davis, for plaintiff.

Griggs, Rinaker & Bibb, contra.

HOLCOMB, C. J.

This is an original action brought in this court for the purpose of enjoining the defendant, the county treasurer of Gage county, from perfecting an attempted sale of certain lots or parcels of real estate for a small portion only of the delinquent taxes assessed against the same, and from issuing certificates of sale of said real estate to the defendant Bibb, the purchaser, and from canceling the remainder of the taxes assessed against said property, and for other similar relief in order to make the injunction effective. The attempted sale of the real estate by the county treasurer which it is sought to have enjoined was made in pursuance and under the provisions of chapter 76 of the laws of 1903, being "An act to provide for the sale of lots and lands for taxes and assessments delinquent for five years or more and the execution of deeds for the same."

The pleadings consist of the petition, an answer thereto, and a demurrer to the new matter found in the answer. From the pleadings it is made to appear that three certain lots in the city of Beatrice had been assessed for general revenue purposes and for special taxes for local improvements, the whole amount, with interest, aggregating more than \$3,300, and which had been due and delinquent for more than five years; that the amount of such delinquent taxes exceeded the assessed valuation of each tract against which assessed, and that the actual value of the premises exceeded the amount of the assess-

ments due and delinquent standing against the same. It further appears that on the first Monday of November, 1903, the treasurer of said county offered each of said lots or parcels of real estate for sale, for the delinquent taxes assessed against the same, to the highest bidder, and that the defendant Bibb bid the sum of \$1 on each of said lots, and, no one else bidding, the treasurer declared each of them to be sold to the said defendant; and that the defendant Moschel, the owner of said lots, was present at said sale. The above are the only averments standing admitted by the pleadings which it is deemed necessary to incorporate in this opinion. The recent enactment of the legislature under which these proceedings were had provides, in substance, that, where taxes and assessments on any real estate shall have continued delinquent for a period of five years or more and the total amount thereof shall exceed the value of the property as returned by the assessor, then it shall be the duty of the county treasurer, commencing on the first Monday of November, and continuing from day to day, to offer said property for sale to the highest bidder for cash, and to issue a certificate of sale showing the purchasers to be entitled to a deed at the expiration of two years from the date of sale, provided, the property has not sooner been redeemed by the owner or a lien-holder. Such purchaser, it is declared, shall take the property purchased upon the payment of his bid, discharged of all liens for taxes and assessments delinquent up to date of sale; and the county treasurer shall, upon the sale of such property, cancel all taxes and assessments delinquent thereon at the date of the sale. It is then provided that the owner or any lien-holder may at any time have the right to redeem the property by paying to the county treasurer, for the use and benefit of the purchaser, the amount for which the property has been sold with 20 per cent. interest for a period of two years, if not sooner redeemed, and 10 per cent. thereafter. Provisions are made for the issuance of a deed at the expiration of two years from the date of sale, and the act is declared to

be cumulative and not exclusive in respect to the remedy for the enforcement of liens and the collection of delinquent taxes by the sale of the property or otherwise. Ch. 76, laws, 1903.

The validity of the law, the substance of which has just been given, is challenged on several different grounds, among them being the contention that its provisions are in conflict with section 4, article IX of the constitution; that it is amendatory in character, and, as such, in its passage and enactment there was a failure to comply with the provisions of section 11, article III of the constitution; that no notice is required for the sale of the real estate which is subject to sale under the provisions of the act; and that it operates to deprive the owner of his property without due process of law. Other objections are urged which we find it unnecessary to discuss or determine in the disposition of the case.

1. The principal contention of the plaintiff pertains to the alleged invalidity of the act under which the defendant, the county treasurer, is proceeding because it violates section 4, article IX of the constitution, which declares: "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

In answer to this objection it is insisted by counsel for defendants that the authority sought to be conferred by the act in question in no way conflicts with the provisions quoted; and that the sale of the property for delinquent taxes, as therein provided, and the cancelation of the tax remaining unsatisfied after such sale, do not operate as a release or discharge of such taxes, nor does the payment of a less amount than the taxes due effect a commutation of such taxes within the meaning of the organic law. Preliminary to a discussion of this, the vital question in

the case, it may be well to submit some observations in relation to the scope and effect of the act under consideration, and the proper rule of construction to be invoked in the determination of the question of its alleged conflict with the paramount law. In this connection it is urged by the defendants that the operation and enforcement of the law provides only for a due and orderly sale of real property against which the taxes are delinquent for five years or more for what it will bring in the open market, thus merging the statutory tax lien on the property in the title of the purchaser thereof, and thereby effectuating a release from the unsatisfied taxes, which, it is insisted, is manifestly an exercise of power properly belonging to the legislature and exclusively within its province. It may be stated, we think, that this might possibly be the result of the operation of the law in some instances, but, even if this be true, it would not upon the question of the constitutionality of the law be decisive of the matter. The vital point to be determined is, what is authorized to be done? The constitutional validity of the law is to be tested, not by what possibly has been or may be done under it, but by what can by its authority be done. What does the law authorize to be done under and by virtue of its provisions? This is the test and this is the doctrine to be applied in reaching a conclusion of the question of its validity. *Stuart v. Palmer*, 74 N. Y. 183; *Thomas v. Gain*, 35 Mich. 155; *Davidson v. New Orleans*, 96 U. S. 97; *County of San Mateo v. Southern P. R. Co.*, 13 Fed. 722; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455.

If the act, the validity of which is challenged, authorizes a method of procedure which in its workings results inevitably in the release of taxes and assessments justly due and for which the property is legally liable, or if in its enforcement it authorizes essentially and in substance a commutation of the taxes assessed against the real estate sold, this, under the doctrine of the authorities cited, brings it in conflict with the fundamental law, and its enactment must be held as being in excess of legislative power.

2. It is argued by the plaintiff that the law is invalid for that no notice of the proposed sale of real estate under the provisions of the act is required, and that none had been given before the sale of the lots complained of was made by the county treasurer, and therefore that he acted without authority. To this a twofold answer is returned by defendant's counsel: First, it is argued that whether or not notice shall be given is wholly discretionary with the legislature, the statute itself providing for a sale on the first Monday of November of all real property on which taxes are delinquent for over five years, and which, with interest, equal the assessed value of the property to be sold, is in itself sufficient notice, and that every property holder is charged with knowledge of these provisions, is bound to know whether the taxes have been paid, and that no other or different notice is required. For the purposes of this case it may be granted that no notice other than that which the law itself gives is required, in so far at least as the question of due process of law is affected. The assessment and levy of the taxes against the property having been made with an opportunity of the lot owner to be heard and for the correction of errors and irregularities, this constitutes the taking of his property for taxes by due process of law and, therefore, no further notice is required than that given by statute of the steps thereafter taken to enforce against the property the collection of the taxes or the sale thereof in satisfaction of the same. It is, however, urged, in the second place, that public notice was in fact given. This contention is predicated on the idea that lands subject to sale under the provisions of chapter 76, laws, 1903, for delinquent taxes, are necessarily included and advertised for sale with all other lands in the published notice required by the general revenue act to be given by the county treasurer, for the sale of all lands on which taxes are due and delinquent for one or more of the years previous to the time of giving such notice. To this view of the matter we cannot give our consent. The notice required to be given under the

general revenue law of the sale of all lands and lots for delinquent taxes, as provided by that act, is not a notice that any real estate will be sold under the provisions of chapter 76, the act under consideration. In fact, the notice given of the sale of lands generally for delinquent taxes negatives the idea that the real estate thus advertised will be sold under the authority conferred or sought to be conferred by the act, the authority of which is challenged in the case at bar. The general notice referred to is required to be given under the provisions of section 193 *et seq.*, article I, chapter 77, Compiled Statutes, 1903 (Annotated Statutes, 10592). The notice therein contemplated, and the notice actually given, is that the real estate against which the taxes are assessed and remain delinquent, or as much thereof as may be necessary, will be sold to satisfy not a part but all of the taxes, interest and costs, and that all lands and lots remaining unsold at the close of the public sale will be sold at private sale, as by law provided, and that, at the private sale thus contemplated, the land will be sold only to a person who will pay the amount of all taxes, interest, penalty and costs. In other words, the notice provides that real estate will be sold at public or private sale to those only who will bid the full amount of all taxes, interest and costs charged against the same. It is obvious that, under the notice thus given and the provisions of the general law referred to, the sale of real estate for delinquent taxes can be effectuated only by a payment of the full amount, including interest and costs, properly chargeable against the same. Instead, then, of the general notice serving to notify prospective buyers and the public generally that the real estate described will be sold, under the provisions of chapter 76, for whatever it may bring, whether more or less than the taxes due, on competitive bidding at a public sale, it provides just the contrary. The notice given in connection with the sale of lands under the general revenue law is specific on the point that the real estate, or such part as is necessary, will be sold for enough to pay

the full amount charged against the same, and, if not so sold, will be offered at private sale for a like amount—no more nor less. The provisions of the general revenue act for a sale of real estate for delinquent taxes is so different and inconsistent with the special provisions contained in chapter 76 that a notice of sale under the former conveys no information, direct or remote, of a contemplated sale under the provisions of the latter act. It is therefore apparent that, in dealing with the questions presented in the case at bar, the act must be treated as though no notice was given or required other than that contained in the act itself.

3. In the determination of the validity of this act and in construing its provisions and their relation to the fundamental law, we should bear in mind that under the laws of this state, as heretofore construed by this court, a tax, general or special, on real estate creates no personal liability or for the payment of which a judgment *in personam* could be obtained. The real property thus assessed is the only property that can be resorted to and taken in satisfaction of the taxes levied against the same. *Grant v. Bartholomew*, 57 Neb. 673; *Lynam v. Anderson*, 9 Neb. 367. It must follow, therefore, as a logical deduction from what has been said and these authorities that the legislative enactment, authorizing a release and discharge of the lien of taxes or any portion thereof assessed and levied on real estate, operates as a release, discharge and cancelation of such taxes for any and all purposes, and precludes the possibility of their satisfaction or collection by any other means, after the real estate against which the taxes are assessed is released from further payment. If, after a sale of real estate, in pursuance of the authority given by chapter 76, for any sum which may be bid therefor, the remaining portion of the tax assessed and levied against such property is canceled as to such real estate, it is canceled and satisfied altogether, and exists no longer as a liability against the property or the person of the owner or tax debtor.

4. We now reach the vital point in the controversy, and that is, does the enforcement of the provisions of the act under consideration operate to release and discharge taxes duly levied and assessed against real estate sold under its authority, or does it authorize such to be done, or the commutation thereof contrary to the constitutional restrictions on the power of the legislature? In the case at bar, real estate aggregating in value over \$3,000 is sold for but \$3, and taxes to the amount of over \$3,000 are to be satisfied and canceled by the payment of that sum. The owner under this law, if it be a valid one, may, on the day succeeding the sale, redeem his property of the value mentioned by the payment of the \$3 and the costs incidental to the sale and 20 per cent. interest on the purchase price for 24 hours, and thereby secure the release and cancellation of the aggregate amount of the taxes, as above stated, justly chargeable against the same. What the law provides for and what is authorized to be done under its provisions have a most vivid illustration in the concrete facts in the case at bar. That its provisions are mischievous and pernicious in the extreme, when we contemplate its practical workings, can hardly be doubted. This of itself, of course, does not warrant us in declaring the act invalid. The legislature possesses unlimited power, except as defined and limited by the organic law, and unless this act contravenes some of its provisions, the court cannot condemn it as invalid, be it fraught with consequences ever so mischievous. To uphold the validity of the act, it is argued by counsel for the defendants, if we understand them aright, that it is within the undoubted power of the legislature to authorize the sale of real estate for delinquent taxes for what it is worth in the open market or at public sale, even though the amount thus obtained be less than the amount of taxes due, and that the cancellation of the unsatisfied portion of the taxes after the sale thus had, or the extinguishment of the tax lien by a sale as thus made, would in nowise violate the section of the constitution heretofore quoted. We readily agree to the

correctness of the proposition. It is hardly to be doubted that, where real estate which for any reason has charged against it taxes in an amount greater than its value, it may be sold for such a sum as may be realized by a public sale upon notice inviting competitive bidding, under reasonable provisions calculated to bring about a fair sale, and, if the tax is not fully satisfied thereby, the cancellation and discharge of the remaining portion as a lien or an apparent lien on the property sold would violate no provision of the fundamental law. To say that such property cannot be sold for what it is worth in the markets, even though for a less sum than the assessments against it, is to defeat the very objects of taxation and lead to results the constitution itself sought to avoid. Unless the property can be sold for its market value, the result would be to exempt the property from all taxation for all time. This, of course, is an absurd result, and any construction leading thereto would be clearly inadmissible. The provisions of chapter 75, laws, 1903, an act which contemplates the accomplishment of substantially the same objects as the one under consideration, make provision for the sale of all such real estate, even though for less than the taxes charged against the same; and the validity of such legislation has very recently been upheld in this court. *Woodrough v. Douglas County*, 71 Neb. 354. Statutory provisions are sometimes found in general revenue acts, whereby county commissioners are empowered, when it is found, as is rarely the case, that the amount of taxes on a parcel of real estate exceeds its market value, to authorize the sale of the same for what may be found to be its fair value and what it will bring at public sale, and to cancel and discharge the portion of the tax remaining unsatisfied after such a sale. It probably would not be seriously contended that such provisions are in conflict with the fundamental law, or that they are not altogether in harmony therewith. Laws of the character referred to but serve to indicate the scope of legislative enactments, which may undoubtedly be passed without

trespassing upon constitutional provisions inhibiting legislation which operates as a release and discharge or commutation of taxes. Reference to the act in question discloses that no judicial sale is contemplated. No method is pointed out for the ascertainment of the worth or market value of the property about to be sold, nor for preventing a sale for a mere nominal sum and regardless of its actual value. No notice of the sale is required to be given, and therefore none can be demanded as of right, either by the property owner, or by the public for whose benefit the taxes are levied, or by prospective bidders. No public sale even is required. No competitive bidding is invited. A sale is authorized, not publicly nor at public outcry, not in the open, but in the seclusion of the office of the treasurer, and for a mere pittance, wholly regardless of the value of the property to be sold, upon an offer by those who may voluntarily present themselves at the office and make a bid thereon. To all intents and practical purposes, real estate sold under the provisions of this act is authorized to be sold at private sale, and for any sum for which a bid may be received. The act does not provide for the sale of real estate for what it is worth, or what it will bring when exposed in the market, publicly and in open competition by those ready and willing to make such an investment. It is an invitation of the most pronounced kind to covinous transactions, inevitably resulting in the release of the property from just burdens of taxation by a sale thereof in form only. By such a sale the property is not exhausted for the satisfaction of the tax lien, nor sold for what it is worth in the markets. The act authorizes, in the strictest sense, a commutation of the taxes by the tax debtor. A friendly purchaser may obtain the land for but a fractional part of its actual value and of the amount of taxes chargeable against the same, whereupon the owner may, if the act be valid, pay to the treasurer the amount thus bid and be released and discharged of the remainder of the taxes due; and thus, by the payment of but a few dollars, which is received and

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accepted in lieu of the larger sum, the entire tax is satisfied and canceled. The case at bar is analogous to and in principle controlled by the case of *State v. Graham*, 17 Neb. 43. In that case it is held:

"Under the constitution of this state requiring all taxes to be levied upon property so that each person shall pay his just proportion of the same, and prohibiting the legislature from releasing any of such taxes or commuting the same in any manner whatever, the legislature has no power whatever to authorize county commissioners to sell and assign certificates of tax sales of real estate purchased by the county for less than the amount of taxes due thereon, where the property if sold will bring the full amount of such taxes."

There, the county purchased real estate for delinquent taxes, and was authorized by the act then being considered to sell and assign such certificates of sale for not less than 50 per cent. of the amount thereof. This, it was held, contravened the provisions of the fundamental law. In this case authority is given to sell real estate for delinquent taxes for much less than 50 per cent. of the amount of the taxes, in fact, for any sum that may be bid, and for the owner to redeem by the payment of the sum bid, with the interest added, and thus effectuate a release and discharge of all the remaining portion of the taxes assessed against such property. In the former case, neither the owner nor the property was released of any portion of the taxes. All the act, in the case cited, sought to accomplish was to authorize an assignment of the tax sale certificates for not less than 50 per cent. of the face value. The act now under consideration authorizes the extinguishment of the entire tax upon the payment of a nominal sum.

In the last analysis, the owner of real estate upon which taxes are delinquent for five years or more is permitted to enjoy the advantage and benefit of a commutation and discharge of such taxes by paying to the treasurer, when the property is sold as in the act contemplated for the benefit of the purchaser, the amount of the bid, with in-

terest, notwithstanding the property was worth in the market far more than the amount of such bid, and that such bid was only for a fractional part of the amount of the taxes chargeable against such property. The inevitable result is the releasing of property from taxes which are justly chargeable against it, and to permit the owner to commute the taxes, as thus assessed, by the payment of a less sum than that which is due to those for whose benefit they were levied. A statute inevitably leading to, and authorizing the accomplishment of, such results is in contravention of the section of the constitution heretofore quoted, and, for that reason, its enactment must be held to be of no force and effect. We are constrained, therefore, to hold that the act is invalid and unenforceable, and that the injunction prayed for ought to be granted and made perpetual, which is accordingly done.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., concurring.

Chapter 76 of the laws of 1903 seems clearly to be unconstitutional. Following its provisions, the owner of real estate of the value of \$3,000, upon which he has allowed the taxes to accumulate from year to year to the amount of the full value of the land, is able to procure the release and discharge of all of these taxes by the payment of \$3, and the costs of sale. This result seems to be contemplated by the statute, and it certainly violates section 4, article IX of the constitution. There is no requirement that the property upon the sale must bring its market or salable value, and no provisions that seem intended to bring about such a result. This is sufficient reason for holding the act invalid, and for the judgment entered in this case.

2. The legislature of 1903 enacted a general revenue law, which is chapter 73 of the laws of that year. The legislature added several other provisions on the same

general subject; chapters 74, 75 and 76 are of that nature. If this chapter 76 were a valid act, it would, of course, be construed together with the other chapters upon this subject enacted at the same time. The acts so construed would provide for and define two classes of sale of land for delinquent taxes. One class would embrace all lands upon which the taxes had been delinquent for more than five years and exceeded in amount the value of the property. The other class would embrace all other lands upon which there were delinquent taxes. The provisions for notice of the sale of land for delinquent taxes are to be found in chapter 73. Section 194 of that chapter provides that a notice shall be published which shall describe the lands "as the same are described on the tax list," and stating "that so much of each tract of land or town lot described in said list as may be necessary for that purpose will, on the first Monday of November next thereafter, be sold by him at public auction at his office for the taxes, interest and costs thereon." Section 199 of chapter 73 provides, among other things, that:

"If no person bid for a less quantity than the whole, the treasurer may sell any tract of land or town lot to any one who will take the whole and pay the taxes and charges thereon." If this section also contained the substance of chapter 76, that is, if there were added to this section a proviso that "In all cases where the taxes and assessments upon any real estate appearing upon the tax list of any county shall have continued delinquent for a period of five (5) years or more for county, state, or other purposes, and where the total amount of delinquent taxes and assessments upon any real estate shall exceed the value of said property," the land might be sold for less than the amount of the taxes due thereon, the application of section 194 would, of course, be the same as when the provision is expressed, as now, in a separate act. It is thought that the language of the notice prescribed in section 194 is not sufficient to indicate that the sale will take place in pursuance of all of the provisions of the statute

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in force. I do not see why the words, "that so much of each tract of land or town lot described in said list as may be necessary for that purpose," should be thought to indicate that the land would not be sold for less than the whole amount of the taxes charged against it. The property owner is notified that all of the land will be sold if it is necessary in order to pay the taxes delinquent thereon, but there is no statement in the prescribed notice, directly or by implication, that the land will not be sold unless it brings enough to pay all of the taxes charged against it. I am unable to understand the reasoning of the majority opinion upon this point. No doubt, if the land were sold for its full value, such sale would not be a violation of the provision of the constitution in question. All tax liens upon which it was sold would be merged in the title of the purchaser. Chapter 76 does not require the land to be sold for its market value, and makes no provision to that end. Notwithstanding that fact, it allows the owner to redeem from the taxes by paying the amount for which the land sold. This is forbidden by the constitution.

THOMAS DENNISON V. GEORGE M. CHRISTIAN.*

FILED DECEMBER 7, 1904. No. 13,883.

1. **Extradition.** Section 364 of the criminal code does not authorize the extradition of a person charged with crime against the laws of another state without proof that the person so charged is a fugitive from the justice of the demanding state.
2. **Warrant.** It is not necessary that the warrant issued by the governor of this state upon the requisition of the governor of another state should contain the express statement that the governor has found that the accused is a fugitive from justice. The fact of the issuing of the warrant, upon demand made upon that ground, is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary.

* See *Dennison v. Christian*, 196 U. S. 637. *Judgment affirmed.*

3. **Habeas Corpus: RETURN.** Upon proceedings in habeas corpus to obtain the discharge of one who is held under the governor's warrant in extradition, it is not indispensable that the officer's return to the writ contain direct affirmative allegations of all of the facts upon which the extradition proceedings are based. If the return sets forth the governor's warrant under which the accused is held, and the recitals of the warrant together with the allegations of the application for habeas corpus show facts sufficient to justify the detention of the accused, the return is sufficient.
4. **Requisition: GOVERNOR'S FINDINGS: QUESTIONS OF LAW.** When such requisition is made upon the governor of this state he must determine: First, whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged he has fled by an indictment or affidavit properly certified; and, second, is he a fugitive from justice from the state demanding him? When it is made substantially to appear to the court in habeas corpus proceedings upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the demanding state.
5. **Review: EVIDENCE.** In determining whether the evidence before the court below was sufficient to support the judgment, this court will not regard errors of the trial court in admitting incompetent evidence if it appear from the whole record that, upon the evidence conceded to be competent, no other conclusion could be reached than the one reached by the trial court.
6. ———: **CONSTRUCTION.** This court is bound by the construction of the extradition laws adopted by the supreme court of the United States. In view of the language of that court in *Hyatt v. Corkran*, 188 U. S. 691, the courts of this state will not review the decision of the governor in extradition proceedings upon a question of fact made before him, which the law makes it his duty to decide and upon which there was evidence *pro* and *con* before the governor.
7. **Cross-Examination: ERROR WITHOUT PREJUDICE.** When the relator in habeas corpus proceedings gives evidence in his own behalf, the court should not allow him to be cross-examined upon matters not related to his examination in chief, but an error in so doing is without prejudice to the defendant, the trial being to the court itself, when no other judgment than the one entered could have been rendered upon the evidence which is conceded to be proper and competent.

ERROR to the district court for Douglas county: GEORGE A. DAY, ALEXANDER C. TROUP and WILLIAM A. REDICK, JUDGES. *Affirmed.*

W. J. Connell, Smyth & Smith, Cochran & Egan and Thomas C. Munger, for plaintiff in error.

H. C. Brome, E. E. Thomas and L. W. Fallon, contra.

SEDGWICK, J.

In April, 1904, the relator, Thomas Dennison, was, by an indictment of the grand jury of Harrison county, Iowa, charged with the crime of receiving and aiding in the concealing of stolen property knowing the same to be stolen. The crime was alleged to have been committed in November, 1892, in Harrison county, Iowa. Upon this indictment, a requisition was issued by the governor of Iowa upon the governor of this state, upon which a warrant was issued by the governor of this state for the arrest of the relator as a fugitive from justice, and for his return to the state of Iowa for trial. He made application to the district court for Douglas county for a writ of habeas corpus, and upon the hearing of that application he was remanded to the custody of the officers under the governor's warrant. He prosecutes these proceedings in error to this court to review that decision. The record shows that the relator was at the time of the alleged offense a resident of the city of Omaha, in this state, and that he has since that time openly and notoriously continued his residence there. The right of the officers and of the special agent of the state of Iowa, designated by the governor's warrant for that purpose, to restrain the relator of his liberty under the governor's warrant was resisted upon various grounds; and, among others, it was insisted by the relator that he was not in the state of Iowa at the time of the alleged commission of the offense, and was therefore not a fugitive from the justice of the state of

Iowa. Various questions arising out of this contention are discussed in the briefs and will be hereinafter noticed. An indictment having been found about 12 years after the alleged commission of the offense, if the crime had been committed in this state, the prosecution would be barred under our statute of limitations; and if the defendant had resided during this time in the state of Iowa, it would likewise be barred under their statutes. The manifest cause of the delay in the prosecution was the failure to discover sufficient evidence against the defendant to warrant it. The defendant's whereabouts during this time being a matter of public notoriety, if this evidence had been sooner discovered, the proceedings for extradition might have been as readily pursued at an earlier date as at the present time. Nothing was done by the relator in the meantime which could have hindered such extradition. Statutes of limitations ordinarily prevent the prosecution of crimes after so long a period of time has elapsed as to render it probable that evidence that might vindicate the accused would be lost or otherwise become unavailable. A statute of limitations which provided that proceedings for the extradition of persons charged with crime should, under circumstances like these, be subject to the same limitations prescribed for criminal proceedings in ordinary cases would perhaps not be unreasonable. Under such a statute the authorities of Iowa would have had the full term prescribed by the statute in which to have begun these proceedings against this relator. His place of residence having been notorious, and no concealment having been attempted, there seems to have been no reason for delay in taking these proceedings that would not have been of equal force if the defendant had resided in the state of Iowa, which might have been but a few rods from his actual residence. It is true that, if a person commits a crime and withdraws himself from the state where he has committed it, without any thought of fleeing from justice, but for the purpose of going to his own home, he is still, within the extradition laws, a fugitive from justice

of the state in which he has committed the crime. This has been frequently determined. It is not contended by relator that the statutes of limitations of the respective states apply to extradition proceedings, nor that one who has become a fugitive from justice may, by lapse of time, under any circumstances, cease to be so regarded; but the foregoing considerations tend to emphasize the necessity of guarding the accused against an unwarranted deportation from the state of his residence.

1. In support of the judgment of the court below it is urged that, in this state, it is not necessary to show that the accused is a fugitive from justice in order to justify his extradition. It is said that our statute provides that one who is charged with having committed a crime in another state may be sent to such state for trial; that the federal legislation upon the subject of extradition is not exclusive, and hence such legislation on the part of our state is valid. There is a dictum of Judge Story's to the effect that the legislation of congress supersedes and prohibits all state legislation upon this subject. *Prigg v. Pennsylvania*, 16 Pet. (U. S.) *539, *617. But the validity of such state legislation, ancillary to and in aid of the act of congress, is now established. See *Ex parte Ammons*, 34 Ohio St. 518; *Ex parte White*, 49 Cal. 433; *Ex parte Romanes*, 1 Utah, 23. And such provisions are now found in the laws of many of the states in the Union. The power to arrest and surrender a fugitive from justice, is not dependent upon the constitution, since it existed prior to the adoption of that instrument; it was recognized among the states under the confederation, and, even before the confederation, among the colonies. *Commonwealth of Kentucky v. Dennison*, 24 How. (U. S.) 66, 16 L. ed. 717, 727. It seems to be reasonable to suppose that the state legislatures have power to authorize extradition between the states independently of the provisions of congress upon that subject.

This case was heard below before three judges of the district court sitting together. It appears that they were

not agreed upon the question of the power of the state legislatures, but it would seem that they were agreed in the view that the statute relied upon does not authorize extradition unless the accused is a fugitive from justice. We find in the record an opinion of Judge Redick, who was one of the judges who heard the case below, in which he concludes that the relator could not be held unless he is shown to be a fugitive from justice, and in this part of his opinion the other judges appear to concur. He says:

"Section 364 contains a proviso at the end of the section. The first part of the section provides that no person shall be removed from the state of Nebraska to any other state, a prisoner, for any crime committed within the state of Nebraska. It then provides certain penalties against any persons who are interested and take part in any such removal; Provided, however, that any person who has committed any crime in any other state, where he ought to be tried for that crime, may be sent to that other state, and it is that proviso which it is claimed warrants the extradition, regardless of the question of whether or not he is a fugitive from justice.

"This section 364 contains in the first part an exception, 'Except in cases specially provided for,' that is, no removal shall be had except in cases specially provided for by statute. It first came upon the statute books of this state by an act passed in 1858, approved November 4, and was section 9 of that act, and the exception which I have just read doubtless had reference to cases provided for by another law in existence at that time, and not now upon the statute books, providing that the governor of the state might enter into contracts with the governors of other states for the care of prisoners sentenced by the courts of this state for crimes committed in this state, because at that time there was no adequate provision in this state for taking care of such prisoners, and the exception which I have just read doubtless had reference to that special provision of the law.

"Section 333, which is declaratory of the law of the

United States, authorizes the governor to extradite an accused when he has committed a crime, or stands charged with the commission of a crime in any other state and is a fugitive from justice of that state, because the provision is that, in cases provided for by the constitution and laws of the United States, the governor shall issue his warrant when it is made to appear that the defendant stands charged, etc. Under that section it must appear that the defendant was a fugitive from justice, otherwise the governor has no power to issue his warrant. That section I have been unable to find prior to the Revised Statutes of 1866. No doubt it was passed prior to that time; but it was not in the criminal code of 1858 so-called, or the collation of the criminal laws in 1858, and doubtless was a subsequent enactment to section 364. Believing that to be true, it probably was intended by this proviso to except or exclude from the prior provisions of that section cases of extradition. * * * No provision in this state with reference to extradition appears prior to this section 364. * * * These two laws were incorporated into the revision of 1866, and also that of 1873, and have been continued in the statute books from that time down to the present, and they are two provisions apparently referring to the same subject. In that case it is the duty of the court to harmonize them if possible.

"Under section 364, when originally enacted, and until the enactment of section 333, there was no method provided by the state for the enforcement of that act—no power granted by the state to the governor to issue his warrant in such cases. The power was given and the duty imposed, however, by the United States statute. * * * While the existence of these two sections is something of an anomaly in a statute, by construing them together under the ordinary rules in the construction of statutes so that it may be possible that both may stand, we conclude that section 333 is the only one which grants power from the state to the executive to issue his warrant for extradition, and that the effect of that section is to re-

strict his power to such cases as are provided for by the constitution and laws of the United States."

The language of the proviso of section 364 of the criminal code, which is referred to, is:

"Provided, That if any citizen of this state, or any person or persons at any time resident in the same, shall have committed, or shall be charged with having committed, any treason, felony, or misdemeanor, in any other part of the United States or territories where he or she ought to be tried for such offense, he, she, or they may be sent to the state or territory having jurisdiction of the offense."

For the reasons stated by the learned district court, we think that this proviso ought not to be construed to provide for extradition in cases not contemplated by the federal statute; but its purpose is rather to so limit the application of section 364 as not to interfere with the legislation of congress on the subject of extradition. No extradition therefore can be allowed unless it appears that the accused is a fugitive from justice.

2. The first contention in relator's brief is that "the warrant and return are insufficient on their face." One ground of this objection seems to be that it does not sufficiently appear upon the face of the papers that the accused is a fugitive from justice. There is annexed to the requisition an affidavit of the prosecuting attorney of Harrison county, Iowa, in which affiant says: "That Tom Dennison, who is charged with the crime of receiving and aiding in the concealing of stolen property committed on or about November 8, 1892, in the county of Harrison, has, since the commission of said crime, actually fled from the state of Iowa, the time of his escape being about November 8, 1892, and that he is now a fugitive from the justice of this state, and I have reason to believe is at Omaha in the state of Nebraska." This was held to be sufficient in *Ex parte Sheldon*, 34 Ohio St. 319, 327. And in *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, it is said:

"It is conceded that the determination of the fact (that the accused is a fugitive from justice) by the executive of

the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

It is not necessary that the writ contain an express recital that the governor found that the accused was a fugitive from justice. The fact of the issuing of the warrant, upon demand made upon that ground, is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary.

3. The foregoing considerations seem also to answer the objection that the return of the respondent is insufficient. This objection seems to be predicated upon the idea that the return to the writ of habeas corpus must contain direct traversable allegations of all the facts upon which the extradition proceedings are based. It is said in the brief:

"There is no allegation, statement or suggestion that Governor Cummins or anybody else presented to the governor of this state any proof whatever that Dennison had fled from the justice of the state of Iowa; no allegation or statement that Dennison was a fugitive—simply that the governor demanded him as a fugitive; no statement or allegation that he was charged with crime in the demanding state, but simply a statement that he was demanded by the governor as one charged with crime; no statement, averment or suggestion that the demanding governor produced or caused to be produced to the governor of this state a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime; no statement, averment or suggestion that the executive of Iowa produced or caused to be produced a copy of an indictment found, or affidavit made, before a magistrate, charging Dennison with having committed a crime, either certified or otherwise."

Some of the things above suggested are shown in the application itself for the writ of habeas corpus. Others

are recited in the return and in the warrant of the governor which accompanies it. There was annexed to the application for the writ of habeas corpus a copy of the indictment and of the affidavit of the county attorney of Harrison county, Iowa, alleging that the accused is a fugitive from justice. The return to the writ alleged the finding of the indictment by the grand jury of Harrison county, and that thereafter application in due form was made to the governor of the state of Iowa for a requisition upon the governor of the state of Nebraska, upon a showing that said Dennison, after the commission of said crime and upon the 8th day of November, 1892, actually fled from the state of Iowa, and was at the city of Omaha in the state of Nebraska. It was also alleged that the governor of Iowa issued his requisition in due form, and that thereafter the requisition so issued by the governor of the state of Iowa was duly presented to and honored by the governor of the state of Nebraska, and that thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition of said Dennison to the state of Iowa. A copy of the warrant is set out in the return, and the recitals thereof are: "Whereas, Albert B. Cummins, governor of the state of Iowa, has demanded of the governor of this state Tom Dennison, charged with the crime of receiving and aiding in the concealing of stolen property, as a fugitive from justice from said state of Iowa, and complied with the requisites in that case made and provided." In *Roberts v. Reilly*, *supra*, it is held that a decision of the governor as expressed in the warrant "is sufficient to justify the removal (of the accused) until the presumption in its favor is overthrown by contrary proof." In *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 456, the return to the writ of habeas corpus "was to the effect that the relator was held by virtue of a warrant of the governor of New York, and a copy of it was annexed. * * * No other paper was returned by the chief of police bearing upon his right to detain the relator." The issue was made by the filing of

an affidavit on the part of the relator which traversed this return, and which set up the facts relied upon to show that the extradition of the relator was unwarranted. Authorities cited by relator upon the general rules of code pleading are not applicable. It would seem that the finding by the governor that accused is a fugitive from justice, which finding is sufficiently declared by issuing his warrant, is conclusive, at least so far as to place the burden upon the accused to make it appear that he is not a fugitive from justice. The decisions of the supreme court of the United States upon the subject of extradition between states are binding upon all persons and upon all courts, and there can be no doubt that, under the decisions of that court above referred to, the return to this application was *prima facie* sufficient.

4. Is the judgment of the district court supported by the evidence?

"When a demand of this character is made on the governor of a state, two questions are presented to him: First, is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified? Second, is he a fugitive from justice from the state demanding him?" *Bruce v. Rayner*, 124 Fed. 481.

When the accused is in custody under the governor's warrant, it is necessary for him, in order to obtain his discharge by the courts upon a writ of habeas corpus, to make it appear, either that he is not "substantially charged with a crime against laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified," or that he is not a fugitive from justice from the state demanding him. When it is made properly to appear to the court upon what showing the governor acted, it becomes a question of law for the court to determine whether or not the accused has been substantially charged with a crime against the laws of the demanding state. If the governor's warrant upon which

he is held recites the proceedings had before the governor, from which it appears that the accused was so substantially charged, it would seem from the cases above cited that the presumption is that the proceedings before the governor were regular in that regard. If the original papers described in the recitals of the governor's warrant are before the court, the evidence so furnished will, no doubt, control the recitals of the warrant. If the recitals of the warrant are not sufficient, and the relator in his application for the writ sets out the original papers that were considered by the governor, there can, of course, be no doubt that the court before which the proceedings are pending will consider those original papers in determining whether the relator was charged with a crime against the laws of the demanding state, and whether the requirements of the federal statute in that regard have been met. In this case, it appears from the application for the writ itself that an indictment had been regularly found in the district court for Harrison county, Iowa, charging the relator with the crime for which he is held, and that, pursuant thereto, a request had been made by the authorities of Harrison county of the governor of the state of Iowa for his requisition upon the governor of this state, and that accompanying that request there was evidence that the accused had fled from the state of Iowa and was then in this state. It appears from the recitals of the governor's warrant that a requisition was made upon the governor of this state for the arrest and return of the relator upon the charge which was contained in the indictment, and it is also recited in the warrant that the governor of the state of Iowa in so doing "complied with the requisites in that case made and provided." It is alleged in the return to the writ: "Said requisition so as aforesaid issued by the said governor of the state of Iowa was duly presented to and honored by his excellency, John H. Mickey, governor of the state of Nebraska, and thereupon the governor of the state of Nebraska issued and delivered to respondent his warrant for the extradition

of said Dennison to the state of Iowa." The evidence of the relator fails to show that these papers were not before the governor of this state when his warrant was issued. On the other hand, the evidence in the record clearly shows that all of these papers and proceedings were duly considered by the governor. The relator then failed to make it appear upon the hearing of his application for the writ of habeas corpus that he had not been substantially charged with a crime against the laws of the state demanding him, or that this fact did not sufficiently appear before the governor of this state when he acted upon the requisition. The evidence is therefore sufficient to support the judgment of the district court, unless the relator has made it appear that he was not a fugitive from justice from the state demanding him.

5. Upon the hearing in the district court a large volume of evidence was taken, principally upon the question whether the accused was a fugitive from justice. Some of this evidence was received against the objection of the relator that it was incompetent to show that the relator was in Iowa at the time of the alleged offense, which was one of the principal questions of fact controverted. An exhibit was offered in evidence which it was claimed was the hotel register of the Kimball House of Davenport, Iowa. Objection was made that no sufficient foundation was laid for its introduction. The objection was overruled, and the evidence received. It is strenuously insisted that the court erred in this ruling. It has been frequently said by this court that the trial court will be presumed to have based its decision on such competent evidence as is introduced before it. And the judgment of the trial court, in matters tried to the court itself, will not be reversed because of errors in receiving incompetent or immaterial evidence, the presumption being that such evidence was disregarded. In this case, however, it appears from a consideration of the whole record that the evidence complained of was not disregarded by the court. Some of the judges who heard the matter appear to have

predicated their judgment, at least in part, upon this evidence. It is plausibly urged that in such case the incompetent evidence must be held to have prejudiced the relator. But this cannot be so if, upon consideration of the competent evidence only, any other decision than the one rendered must have been erroneous. In the following discussion of the sufficiency of the evidence the reasons will be given for the conclusion that no other decision could have been supported upon the evidence which is conceded to be competent.

6. In *Hyatt v. Corkran*, 188 U. S. 691, it was said:

"It must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

* * * The question whether the person demanded was substantially charged with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; the question whether the person demanded was a fugitive from the justice of the state was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory."

Prior to that decision there had been much controversy and some conflicting decisions in the courts of the several states as to whether the decision of the governor that the accused was a fugitive from justice might be reviewed judicially in proceedings in habeas corpus. In some cases the decision of the governor was thought to be conclusive upon the courts, and in others it seems to have been considered as open to investigation as an original question. In *Hyatt v. Corkran*, *supra*, it was shown by stipulations upon the record itself that the accused was not in the demanding state at the time of the alleged commission of

the crime charged, and it was held in that case that, when the facts from which it must follow that the accused is not a fugitive from justice "are proved so that there is no dispute in regard to them," the accused must be discharged. In the opinion this language is used:

"If upon a question of fact, made before the governor, which he ought to decide, there were evidence *pro* and *con*, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive."

In *Bruce v. Rayner*, 124 Fed. 481, it was said by the circuit court of appeals of the fourth circuit:

"If conflicting evidence has been submitted to the governor of the state in which the person is found upon the question of fact, and he, considering it, had decided to deliver the person demanded, the presumption being always in favor of the governor's decision, the courts will not inquire into and reverse his decision."

And to support this proposition the above language from *Hyatt v. Corkran*, *supra*, was quoted by the court. These are the latest expressions of the federal court upon this question that have been brought to our attention. There can be no doubt that this record shows that the question whether the accused was a fugitive from justice was before the governor; that there was sufficient evidence before him to make it appear, at least *prima facie*, that the accused was a fugitive from justice. Under the rule established by the federal courts in the above cases, this was sufficient to justify the remanding of the relator, unless it appeared from the record itself that he was not a fugitive from justice, or was made to appear by such clear and invincible proof that it can be said from the whole evidence that there was no dispute before the governor in regard to the fact. If the facts from which it is to be determined whether the accused is a fugitive from justice are established by the record, or if they are so established by proof

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that it may be fairly said that there is no dispute in regard to them, then the question would become a question of law to be determined by the court upon the habeas corpus proceedings, but, if it appear that there was evidence before the governor that was substantially conflicting in regard to the facts upon which this question is to be determined, the responsibility of determining the question rests with the governor.

The relator undertook to prove that he was not in the state of Iowa at the alleged time of the offense charged against him. There is no doubt of the competency of this proof, nor that, if this fact was conclusively shown upon the record, or was so proved that it could be said that there was no substantial dispute in regard to it, it would require the discharge of the accused. To establish this proposition, the relator himself testified that he was in Omaha, Nebraska, from the end of October, 1892, down to the first of January, 1893; that on the night of November 4 he stayed at the Arcade hotel, in Omaha, and that he was not at any time during the period from that time to the first of January following in the state of Iowa. He produced several witnesses who corroborated him in these statements. Although the occurrence was some 12 years before this hearing, these witnesses testified that their attention had been particularly called to the facts at the time, and their testimony was positive that he was not out of the city of Omaha during that time. There are circumstances tending, at least in some degree, to discredit this testimony, and even though there were not, the statements of these witnesses are contradicted by other evidence; and without going into a detailed statement of the evidence that was adduced upon this point, it is sufficient to say that the testimony of these witnesses is not of such a character, in view of the other evidence in the record, as to enable us to say that the matter was established beyond dispute. It seems clear therefore that the evidence upon the hearing in the district court, which is conceded to be competent, shows that all questions of fact necessary

to a determination of the matter were fairly controverted before the governor. That being the case, the rule now established by the federal courts precludes the courts from reviewing those questions upon habeas corpus proceedings. The great delay in beginning the proceedings for extradition, and all facts bearing upon the question whether the accused is a fugitive from justice, would be duly considered by the governor.

Objection was made to the cross-examination of the relator, and it seems that upon this cross-examination matters were inquired into that had no relevancy to the questions being investigated; but, from the view that we take of the effect of the competent evidence in this case, and considering that the evidence was to be weighed by the court itself, we cannot see that any prejudicial error against the relator was committed.

The judgment of the district court was the only one possible upon the evidence before it, and is

AFFIRMED.

FRED ESCH V. LIZZIE GRAUE.

FILED DECEMBER 7, 1904. No. 13,682.

1. **Bastardy: TRIAL.** It is not error for the court, on the trial of a bastardy case, to refuse to order or cause to be removed from the court room a child less than five months old, brought by the prosecutrix with her to the witness stand, where such child was not exhibited to the jury, and no comparison was made between it and the alleged father.
2. **Testimony of Prosecutrix.** In such a case, the testimony of the prosecutrix that she was the mother of a bastard child; that it was born on a certain date; that it is a girl, and the accused is its father, together with the fact that she brought a child with her to the witness stand, is sufficient to warrant the inference that such child was born alive, and was living at the time of the trial.
3. **Evidence examined, and held** sufficient to sustain the verdict.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Rose & Comstock, for plaintiff in error.

Billingsley & Greene and *R. H. Hagelin*, *contra.*

BARNES, J.

Fred Esch, hereinafter called the plaintiff, prosecutes error from a judgment of the district court for Lancaster county, by which he was found to be the father of the bastard child of Lizzie Graue, and was adjudged to pay \$100 a year for 10 years, and the sum of \$50 a year for 4 years thereafter for its support, together with the costs of the prosecution.

1. It is contended by the plaintiff that the court erred in allowing the child in question to remain in the court room during the trial. It appears that the prosecutrix came into court with the child, which was less than 5 months old, in her arms; that nothing was said about the matter until the close of the plaintiff's evidence, and at a time when the cries of the child disturbed the counsel in his examination of one of the witnesses. He then objected to its presence, and a controversy between counsel arose over the matter. It does not appear that the child was exhibited to the jury, or that the attention of that body was in any way called to it, except as above stated. The jury made no comparison to ascertain whether there was any resemblance between the child and its putative father. It does appear, however, that one of the attorneys for the prosecution made a remark calculated to convey the impression that the child looked like the plaintiff in error, but the remark being excepted to the court said: "The exception is well taken. The child has not been introduced in evidence, and its appearance is not to be considered by the jury, and you should not consider the statement made by counsel." This left the plaintiff

no cause of complaint, so far as that matter was concerned.

As the record stands, we are called upon to determine whether the mere presence of the illegitimate child in the court room, and the fact that it was in sight of the jury, calls for a reversal of the judgment. In other words, did the court err in refusing to order the child removed from the court room. In the case of *Hanawalt v. State*, 64 Wis. 84, the court said:

"In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child."

This rule seems to have been approved by us in *Ingram v. State*, 24 Neb. 33. In fact it is believed that the great weight of authority now holds that a child less than 2 years of age may not be exhibited to the jury for the purpose of showing its likeness to the defendant in a bastardy proceeding. It will be observed that in this case no such exhibition was in fact had, and it appears that the court made a finding to that effect on the hearing of the motion for a new trial, where that question was presented. So we hold that the case of *Hutchinson v. State*, 19 Neb. 262, states the correct rule. In that case it was held not error for the trial court to refuse to order or cause to be removed a seven months' old child brought by the prosecutrix to the witness stand, there being no reference made to it during the trial or argument, and no comparison being made between it and the alleged father. This disposes of plaintiff's first ground of error.

2. It is further contended that the evidence in this case is not sufficient to sustain the verdict or finding that the plaintiff herein was the putative father of the child in question; and the particular ground of this contention is that no evidence was introduced to show that the child was born alive, or was living at the time of the trial. It seems somewhat singular that this question should be urged and presented after the strenuous argument of the plaintiff's counsel that the child should have been ex-

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cluded from the court room, and should not have been permitted to be in a place where it might be even seen by the jury. But we are disposed to give this contention our serious consideration. The prosecutrix testified on that question as follows:

Q. Are you the mother of the child that has been born?

A. Yes, sir.

Q. When was the child born?

A. 27th of July.

Q. Of this year?

A. Yes.

Q. Is it a girl or a boy?

A. It is a girl.

Q. Who is the father of that child?

A. Fred Esch.

This testimony considered with the fact that the prosecutrix appeared in court with the child in her arms, and no question was raised as to whether or not it was alive, when born, and living at the time of the trial, until after the verdict was rendered, would seem to be sufficient to sustain said verdict. Again, in *Priel v. Adams*, 3 Neb. (Unof.) 305, we announced the following rule: "In a prosecution for bastardy when it is proven that a child was born upon a certain day it may be inferred that it was born alive." This seems to conclusively settle the question.

No other errors are assigned or argued in the brief of the plaintiff, and, as the evidence on all other questions is sufficient to sustain the verdict, it follows that the judgment of the trial court was right, and should be affirmed.

For the reasons above stated, the judgment of the district court is

AFFIRMED.

H. J. MAYS V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,683.

1. **Forgery: EVIDENCE.** Where, on the trial of a person accused of uttering a forged check, the prosecuting witness positively identified the defendant as the one who gave him the check, and his evidence was corroborated by another witness who was present when the check was cashed, and by the facts and circumstances surrounding the transaction, it cannot be said that such identification was not sufficient to sustain a conviction.
2. **Alibi: PROOF.** A defendant, to establish an *alibi* must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
3. **Hearsay Evidence.** The testimony of a witness that a third person had stated to him that he was guilty of the crime of which the defendant was accused is hearsay evidence, and therefore not admissible.
4. —: **WRITTEN STATEMENT.** An ordinary written statement of such third person that he committed the crime in question, which is not sworn to, and is not preserved in the form of a deposition, is not competent evidence, and should not be received as a defense to the prosecution.
5. **Instruction: REASONABLE DOUBT.** We decline to approve of the instruction given in this case defining a reasonable doubt as set forth in the opinion herein, but in view of our former decisions we cannot reverse the judgment herein for the giving of that instruction. *Lillie v. State*, ante, p. 228, followed.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

William Gaslin and Frank E. Beeman, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

BARNES, J.

The state prosecuted one H. J. Mays, in the district court for Buffalo county, on an information containing two counts. The first count charged him with forging a certain check purporting to be signed by one Martin Bleck, on the City National Bank of Kearney, Nebraska, for the sum of \$57; and the second count charged him with uttering and passing said forged check, knowing the same to have been forged. The trial resulted in a verdict of not guilty on the first count, and guilty as charged in the second count. After overruling defendant's motion for a new trial, the court sentenced him to be confined in the state penitentiary for a period of three years, and pay a fine of \$100, together with the costs of the prosecution. From that judgment he prosecutes error.

1. The accused contends that the evidence is not sufficient to sustain the verdict, because of an alleged failure to identify him as the person who passed the check on the prosecuting witness. He also claims that the evidence establishes an *alibi*; and these assignments of error will be considered together. An examination of the evidence contained in the bill of exceptions discloses that the prosecuting witness, Switz, positively identified the accused at the jail, the next day after he was arrested, as the man for whom he cashed the check; that he again identified him as positively at the trial, and gave such a circumstantial account of the transaction by which he took the check from the accused in payment of a small purchase of goods, and paid him the difference of \$38 in cash, as to leave no reasonable doubt that the accused was the person who uttered the check. Again, the witness Johnson, who was present at the time the check was cashed, positively identified the accused as the person who passed it on the complaining witness. In addition to the testimony of these witnesses, other corroborating facts and circumstances were shown, so we are of the opinion that the

identification of the accused as the person who uttered the check in question was complete.

We have carefully examined the evidence to ascertain what it shows on the question of the *alibi* contended for by counsel, and we are unable to sustain that contention. No witness fixes the whereabouts of the accused at any particular place, at any exact point of time; no one pretends to definitely fix the time of the events detailed by his evidence, and it appears that, after the accused was first seen on the evening the check was uttered, there was plenty of time, before he was arrested, for him to have visited all of the places where he was seen, or where he claims to have been on that occasion. The rule is that "A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place." *Klein v. People*, 113 Ill. 596. So we are constrained to hold that the evidence was amply sufficient to sustain the verdict.

2. Counsel for the accused further contend that the court erred in excluding the evidence of an alleged confession of one Harry Wilson, who seems to have been acting with the defendant in the transactions leading up to the commission of the crime of which he was convicted. It appears that Wilson had broken jail, and was then, and still is, at large, a fugitive from justice. He told the defendant's counsel and another that he was the one who uttered the check; and left a written statement to that effect when he made his escape. At the trial counsel offered to prove Wilson's statement by his own evidence, which offer was excluded. No authority need be cited to show that this evidence was hearsay, pure and simple, and was properly excluded for that reason, if for no other.

As to the written statement, it was not sworn to, was not preserved in the form of a deposition, nor did it

possess any of the elements which would render it competent evidence for any purpose whatever, and the court did not err in excluding it.

3. Error is also assigned for the giving of paragraph No. 13, of the court's instructions, as follows:

"A reasonable doubt, as used in these instructions, to justify an acquittal must be a reasonable one arising from a candid and impartial investigation of all the evidence in the case. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the jury is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."

The principles enunciated in this instruction have been approved by us. See *Willis v. State*, 43 Neb. 102. About two years after the opinion in that case was filed, Commissioner IRVINE, in *Barney v. State*, 49 Neb. 515, in discussing this instruction said:

"Whenever a court undertakes to define a reasonable doubt, it opens the way to a vast amount of speculative reasoning without any very practical application. As said by Judge Thompson, in his work on Trials: 'All the definitions are little more than metaphysical paraphrases of an expression invented by the common law judges, for the very reason that it was capable of being understood and applied by plain men in the jury box.' (2 Thompson, Trials, sec. 2463.) The writer very much doubts whether

any confusion has ever existed in the mind of a jurymen in regard to the meaning of the term, except where that confusion has arisen from such attempts to define the term."

So it appears that by our later holdings we have disapproved of this form of instruction, but have declined to reverse a case simply because it was given to the jury. Again, it was said in *Lillie v. State*, ante, p. 228, after quoting from the language of Mr. Commissioner IRVINE, above quoted:

"The instruction may be deserving of some of the criticism it has provoked, but in view of the former decision of this court, we cannot reverse this judgment solely on account of the giving of this instruction."

So, while we do not approve of the instruction, we feel bound by the doctrine announced in our later decisions, and we cannot reverse the judgment in this case solely on the ground of giving this instruction.

A careful examination of the bill of exceptions satisfies us that no error was committed by the trial court in the admission or exclusion of evidence. The record discloses no reversible error, and the judgment of the district court is therefore

AFFIRMED.

EDWARD M. CUTHBERTSON V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,813.

1. **Desertion of Wife: INFORMATION.** In order to charge the crime of wife desertion under the provisions of section 212a of the criminal code, the information must clearly state that both the abandonment and the defendant's neglect or refusal to maintain or provide for his wife were without good cause.
2. **Venue.** The prosecution for such crime must take place in the county where the parties resided at the time of their separation, and where the wife was still residing when the unlawful neglect or refusal of the husband to maintain and provide for her occurred, although the first act of separation took place while the parties were temporarily in another county.

3. **Evidence: REVIEW.** Where the evidence on the question of the neglect or refusal of the husband to maintain or provide for his wife is conflicting, this court should not pass on its sufficiency, but will leave that matter for the determination of the jury.
4. **Trial.** In such a case the prosecution should not be permitted to prove acts tending to show improper familiarity between the accused and a woman other than his wife, where such acts occurred before the alleged desertion took place, and appear to be in no way connected therewith.

ERROR to the district court for Douglas county: **GEORGE A. DAY, JUDGE.** *Reversed.*

Brome & Burnett and A. G. Ellick, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

BARNES, J.

Edward M. Cuthbertson, hereinafter called the defendant, was convicted in the district court for Douglas county of the crime of wife desertion, under the provisions of section 212a of the criminal code, and was sentenced to imprisonment in the county jail for a period of six months, and required to pay the costs of the prosecution. From that judgment he brings error.

1. Defendant's first contention is that the trial court erred in overruling his objection to the introduction of any evidence and his motion in arrest of judgment, because the information does not charge a crime; or, in other words, it does not allege a violation of the provisions of the statute in question. The act, so far as it relates to the question involved in this case, reads as follows:

"That every person who shall, without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, * * * shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or

by imprisonment in the county jail for not more than six (6) months."

It is apparent from reading the statute above quoted that abandonment alone, even without good cause, is not sufficient to constitute the crime of wife desertion. There must also be a wilful neglect or refusal to maintain or to provide for the wife, without good cause. The law is somewhat drastic, but it seems clear that the legislature never intended to make it a penal offense for a man to live separate and apart from his wife. Indeed, conditions sometimes arise where parties cannot well live together, and to continue the marital relation would be intolerable to one or perhaps both of them. While it requires the commission of both acts to constitute the crime, yet it is beyond question that the real purpose of the legislature in passing this statute was to make it a penal offense for a man, without good cause, to neglect or refuse to maintain or provide for his wife. To furnish maintenance for the wife is a legal duty which a husband owes to her, the performance of which should be made certain, unless by her own conduct she forfeits her right to demand it; and when such forfeiture occurs, the husband may be said to have good cause for his neglect or refusal to perform that duty. Again, there can be no conviction under the statute in question if it appears that by reason of physical injury or disability, such as destroys the earning capacity of the husband, together with his lack of property, money or estate, he is unable to support his wife. The existence of such a condition would amount to good cause, and constitute a complete defense to a prosecution on such a charge. So we are of the opinion that it was necessary to charge in the information that both the abandonment and the neglect or refusal of the defendant to maintain or provide for his wife were without good cause. The charging part of the information is as follows:

"That on the 18th day of September, in the year of our Lord one thousand nine hundred and three, Edward M. Cuthbertson, late of the county of Douglas aforesaid, in

the county of Douglas and state of Nebraska, aforesaid, then and there being, and then and there being the lawfully wedded husband of Mildred Cuthbertson, then and there unlawfully and without good cause did abandon his said wife, the said Mildred Cuthbertson, and did then and there wilfully, unlawfully and feloniously neglect and refuse to maintain or provide for her, the said Mildred Cuthbertson."

A fair construction of the language above quoted leads us to the conclusion that the words "without good cause" apply to the charge of abandonment only, and that the information fails to allege that the defendant's neglect and refusal to maintain or provide for his wife was without good cause. The sufficiency of this charge was questioned at every stage of the proceeding, and we should not under such circumstances give the language a strained construction in order to hold it sufficient. It will be observed that the prosecutor in attempting to charge the offense has not followed the language of the statute. It is a well settled rule that an indictment for a statutory crime must follow, in substance, the language of the statute. 1 Bishop, Criminal Procedure (4th ed.), sec. 614. Judge MAXWELL in his work on Criminal Procedure (2d ed.), 145, speaking of indictments, says: "Let the pleader charge the offense in the words of the statute, and if the offense is made a felony by statute allege that the act was 'feloniously' done." Indeed, it is a fundamental rule that in charging a statutory offense it is always necessary, and generally sufficient, to charge it in the language of the statute or its equivalent. We are therefore of the opinion that the court erred in holding the information sufficient to charge a violation of the statute in question.

2. The defendant's second contention is that the prosecution took place in the wrong county; that the abandonment having occurred in Dawes county he could only be prosecuted in that county. An examination of the record discloses that the defendant and his wife were married in

Douglas county in 1901; that the city of Omaha, in that county, was their home or place of residence from that time until the early spring of 1903; when, for a short time, they kept a hotel at Humphrey, in Platte county, Nebraska. The evidence does not show that they gained a residence in that county, but it appears therefrom that they sold out their hotel business and returned to Omaha in June, 1903; that defendant sought and found employment with the Chicago & Northwestern Railroad Company, which required his presence at Chadron, in Dawes county, and at other points in South Dakota and western Nebraska; that he left his wife at their place of residence in Omaha while he was so employed; that in August of that year he wrote to her to visit him at Chadron, and sent her a pass to that place with return transportation to Omaha; that she was with him in the Black Hills, at the Hot Springs, Chadron and other places, from the 18th day of August until the 18th day of September, at which time they were stopping at a hotel in Chadron. On that day a quarrel took place between them, and the defendant left for Holden, Missouri, where he obtained employment with Owen Brothers. Before he took his departure he paid his wife's bill at the hotel until the next day, furnished her with some money, and it was understood that she would at once return to their place of residence in Omaha. This she did, and the defendant was aware of that fact, for he afterwards wrote her several letters and, as he claims, sent her money to that address. As above stated, it requires not only an abandonment, but also a wilful neglect or refusal to maintain or provide for the wife, without good cause, to constitute the crime of wife desertion. The evidence is without conflict, that the defendant, on the 21st day of November, sent a check to his wife at Omaha, Nebraska, for one-half of the wages he had earned up to that time. She admits having received this check, but says that she never got it cashed, and lost it in some manner. This, however, was no fault of his, and his neglect or refusal to maintain and provide for

her occurred, if at all, after that date. She was at that time living at their former place of residence in Douglas county, and the crime was committed, if at all, in that county. *State v. Weber*, 48 Mo. App. 500; *State v. Satchell*, 68 Mo. App. 39. It is quite immaterial where the first act of separation occurs, if such act is followed by a wilful refusal to support at the place previously provided by the husband and considered by them as their home. The county in which the home is fixed fixes the venue of the offense. Under the facts in this case a prosecution could not have been maintained in Dawes county, and the defendant's contention on this point cannot be sustained.

3. It is next contended that the evidence does not warrant a conviction on the merits. The defendant admits that he abandoned his wife on the 18th day of September, 1903, at Chadron, in Dawes county, Nebraska; but he emphatically denies that he has neglected or refused to maintain or provide for her, and vigorously contested that question at the trial. It is shown that at least for a time thereafter he did maintain and provide for her. As to whether or not he refused and neglected to perform that duty after the 21st day of November, 1903, the evidence is conflicting. In such a case it is not the province of this court to pass on the sufficiency of the evidence. That matter must be left for the determination of the jury.

4. The defendant also assigns error in the admission of certain evidence on the part of the prosecution. The assignment is subdivided into several propositions, but one of which requires our consideration. It appears that the trial court, over proper objections, received the evidence of one Clara Lyon, which tended to prove acts of improper familiarity between the defendant and a dining-room girl at the hotel in Chadron, at a time prior to the date of the alleged abandonment, which seems to be in no way connected with that act, or with his subsequent neglect or refusal to maintain or provide for his wife. This evidence certainly did not establish or tend to establish the charge set forth in the information. It must have discredited the

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defendant before the jury, and its admission was prejudicial error.

As to the other propositions, it is sufficient to say that, while the prosecution was required to prove a negative and thus establish want of good cause, yet, such proof is sufficient if the evidence shows that the husband has the ability to support the wife, and that she has not so conducted herself as to furnish good cause for his desertion. If any of the evidence excepted to was incompetent for that purpose, the court, in the event of another trial, will, without doubt, exclude it.

For the errors above mentioned, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

UNION PACIFIC RAILROAD COMPANY v. JOHN WESTLUND,
ADMINISTRATOR.*

FILED DECEMBER 7, 1904. No. 13,203.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

John N. Baldwin and Edson Rich, for plaintiff in error.

Warrington & Stewart, George W. Thomas, H. M. Sinclair and Roscoe Pound, contra.

AMES, C.

The record in this case is substantially identical with that in *Union P. R. Co. v. Fickenscher*, ante, p. 187, and the opinion in that case is therefore decisive of this.

It is recommended that the judgment of the district court be reversed and the cause remanded for a new trial.

OLDHAM, C., concurs.

* Rehearing allowed. See opinion, p. 734, post.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for a new trial.

REVERSED.

The following opinion on rehearing was filed December 7, 1906. *Judgment of reversal adhered to:*

SEDGWICK, C. J.

This action was brought in the district court for Dawson county to recover damages caused by a fire alleged to have originated in the carelessness of the defendant. The case was argued and submitted with the motion for rehearing in the case of *Union P. R. Co. v. Fickenscher*, ante, p. 187, and for the reasons stated in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SAMUEL ECCLES V. UNITED STATES FIDELITY & GUARANTY COMPANY.

FILED DECEMBER 7, 1904. No. 13,646.

Sureties upon an official bond are liable for a statutory penalty incurred by their principal by taking illegal fees.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Reversed.*

A. Hardy, for plaintiff in error.

Hazlett & Jack, contra.

AMES, C.

Defendant in error signed, as surety, the official bond of one W. H. Walker as a justice of the peace. This action was brought upon the bond against Walker and his surety

to recover the statutory penalty of \$50 for an alleged receipt by the former of illegal fees in his official capacity. The defendants answered separately, and there was a trial and verdict for the plaintiff. Upon motion the court set aside the verdict and granted a new trial as to the surety, but denied a like motion by Walker. Afterwards the court sustained a motion by the surety to dismiss the action as to it, on the ground that the petition does not state facts sufficient to constitute a cause of action against it. From the judgment of dismissal the plaintiff prosecutes error.

It is not disputed that the defendant in error was lawfully obligated as surety upon the official bond of Walker, which it was doubtless capable of becoming by estoppel, if not otherwise; and the sole question properly presented for decision is whether a surety upon an official bond is liable for a statutory penalty incurred by his principal by taking illegal fees. We think the answer should be in the affirmative. It was so decided by this court in *Kane v. Union P. R. Co.*, 5 Neb. 105, and again in *Phoenix Ins. Co. v. McEvony*, 52 Neb. 566. We do not see how it can be held otherwise than that the justice committed the offense complained of by virtue of his office. He collected a gross sum as his taxable costs or fees in a suit before him, and the illegal charge was an item contributing to that amount, so that the act was an inseparable part of his official conduct, and the statute denouncing the penalty treats the taking of illegal or extortionate fees, in terms, as an official act. Sec. 34, ch. 28, Compiled Statutes, 1903 (Annotated Statutes, 9060). Counsel for defendant in error are mistaken in supposing that *Snyder v. Gross*, 69 Neb. 340, and *State v. Porter*, 69 Neb. 203, are in conflict with the foregoing. The former of these latter cases was an instance in which it was attempted to hold the sureties of a justice of the peace liable for an act entirely foreign to any duty enjoined upon him in connection with his office, and in the latter of them it was sought to recover fees received for services not attempted to be required of the secretary of state, but of the person who happened to hold

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that office as a supposed member of an unconstitutionally and illegally constituted official board or commission. He certainly did not receive them by virtue of his office as secretary of state, and, in the opinion of the writer, the decision goes to the furthest limit of linguistic propriety in saying that they were taken by color of that office. They were taken under color of the void statute.

We are of opinion, therefore, that the judgment of the district court dismissing the action as to the defendant in error is erroneous, and recommend that it be reversed and a new trial granted.

OLDHAM, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court dismissing the action as to the defendant in error be reversed and a new trial granted.

REVERSED.

FRED FELSCH ET AL. V. ALICE BABB ET AL.

FILED DECEMBER 7, 1904. No. 13,460.

1. **Jury: IMPANELING: DISCRETION OF TRIAL COURT.** A trial court has a large discretion in sustaining challenges for cause of persons drawn as talesmen to serve as jurors, and its exclusion of such a person cannot be successfully assigned for error when it is not shown by the party objecting that by reason thereof an incompetent juror has been included in the panel, and it does not appear that the court has committed an abuse of discretion.
2. **Review.** The mere fact that a bailiff who summoned a talesman who served as a juror was afterwards called and testified as a witness for the successful party is not assignable for error.
3. **Verdict.** Under the circumstances of this case the damages awarded by the verdict are not so exorbitant as to be evidence that they were assessed under the influence of passion or prejudice.
4. **Action for Personal Injuries: TRIAL.** Although a plaintiff in an action to recover damages for personal injuries may be permitted

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to show his wounds and contusions to the jury, it may be reversible error to permit a dramatic exhibition by him in the presence of the jury as a demonstration of the extent of his physical disabilities.

5. **Joint Petition in Error.** When two or more persons join in a petition in error in this court, no error can be availed of that is not prejudicial to both or all of them.

ERROR to the district court for Stanton county: GUY T. GRAVES, JUDGE. *Affirmed.*

Barnhart & Free, for plaintiffs in error.

W. W. Young, William V. Allen and Willis E. Reed,
contra.

AMES, C.

This is an action by a married woman, in her own behalf and as next friend of her two minor children, to recover damages from the defendants, a saloon keeper, and the surety on his bond, for having incapacitated the husband and father by causing his intoxication, and for personal injuries resulting therefrom. There is sufficient evidence in the record to justify the jury in having found the following facts embraced within the issues made by the pleading, and they will therefore be stated as though not in dispute. There was a verdict for the plaintiffs for \$2,000, from a judgment on which the defendants prosecute error.

The husband was a man about 51 years of age, who was afflicted with congenital curvature of the spine, but was otherwise in good health, or, at least, sufficiently so to earn, and he did earn until the happening of the event complained of, sufficient money to support his family in the degree of comfort usual or customary in his station in life, which was that of a common laborer. He was not accustomed to steady employment, but earned his livelihood by doing odd and miscellaneous jobs such as are ob-

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tainable by a man of all work owning a team and wagon in a thriving village of several hundred inhabitants. He had lived in the village a good many years, and his earnings varied from \$600 to \$900 a year. The exact amount is not ascertainable, but sufficient, as already said, to support his family comfortably, and to clothe his children decently and enable them to attend the public schools. He was, however, as was well known in the community and to the defendant Felsch, addicted to the excessive use of intoxicating liquors, which, possibly in some degree on account of nervous instability connected with his malady above mentioned, affected him injuriously. On the morning of the 15th day of November, 1901, Babb visited the saloon of the defendant Felsch, and became extremely intoxicated by liquors which he procured and drank therein. Immediately upon leaving the saloon he attempted to ascend a stairway of an adjoining building, and, because of his intoxication, fell some distance to the foot of the stairs, where he was shortly afterwards found insensible and removed to his home. There was a contusion on the left side of the head, but the patient shortly afterwards recovered consciousness and the control of his physical and mental faculties. Two or three days afterwards paralysis of the right side supervened to the extent of practical helplessness, and continued thence to the time of the trial, and is seemingly permanent. There is a conflict in the evidence, or rather it is conjectural from the evidence, whether the paralysis arose from the wound on the head, or the shock of the fall, or from the disease or malformation of the spinal column, or from the effects of wounds received many years previously, or from a condition of the system induced by a long habit of drunkenness, or from the united influence of all or some of these conditions. We do not deem ourselves more capable of making an intelligent guess in the premises than were the jury, and shall not attempt to revise their finding.

The first assignment of error is that the court excused a juror drawn as a talesman upon the objection that the

sheriff had "failed to carry out the instruction of the court in summoning from the body of the county and outside of Stanton and the precinct where this transaction took place." Under the circumstances of local excitement concerning the litigation, we do not think the court erred, especially inasmuch as it is not contended that an equally competent and impartial juror was not substituted in his place. A trial court has and ought to have a wide discretion in sustaining challenges for cause, especially in cases of persons called as talesmen, whose incompetency may be apparent in many ways difficult to reflect from the record of an examination upon a *voir dire*.

It is secondly assigned for error that a talesman who was called, and who served, in substitution for the one above mentioned, was summoned by a bailiff who was afterwards sworn as a witness for the plaintiff; but as no complaint is made with reference to the competency of this juror, and as it does not appear that the bailiff acted corruptly or was interested in the suit, the fact does not appear to be material.

It is next complained that the damages are excessive, appearing to have been given under the influence of passion or prejudice, the ground of the complaint being, in substance, that Babb was before the happening of the injury a physical and moral wreck from some or all of the causes, other than the fall, above detailed, and that his ability and usefulness as a wage earner had ceased to be of any appreciable value or, at all events, were of very much less value than the sum awarded. But this is not the whole of the story. However small may have been his earning capacity before the injury, he was not before that time, as he has been since and apparently will continue to be, a confirmed invalid and a burden upon his wife and children for his own subsistence and for nursing and medical attendance. These and like circumstances would have been properly taken into account by the jury, and doubtless were so, in determining the amount of the recovery. That their consequences were and are largely conjectural goes

without saying, but greater certainty is not attainable in such cases, and the inferences to be drawn from them are peculiarly within the province of the jury, and we do not feel warranted in saying that \$2,000 is so obviously an exorbitant award as to warrant the presumption that they were influenced by improper motives.

There is one other circumstance of the trial, disclosed by the record and complained of by the plaintiffs in error, which tends to support the complaint of the plaintiffs in error in this regard, and which, if we regarded the damages allowed as in any considerable degree too liberal in amount, would in our opinion require a reversal. Babb was produced and sworn as a witness for the plaintiffs at the trial, and in the course of his examination in chief the following comedy was enacted. We quote from the brief of the plaintiff in error, the correctness of which, in this particular, is not disputed:

Q. Now, Mr. Babb, I wish you would get down here, if you can walk, and show how you walk, and if not, you—

The counsel for the plaintiffs at this time ask the witness to present his right arm and leg, and in fact his whole person to the jury for examination, and exhibit to them his capability to walk and handle articles with his hands. To this request the defendants object for the reason that it is not in the form of a question, being an exhibition to the jury, and is not sufficiently defined as to give counsel for the defense an opportunity to know what to expect as a result. Objection overruled: To which ruling the defendants except. The witness here came down off the witness stand without assistance, and with the assistance of his wife took off his coat and rolled up his sleeve.

Q. Raise up that arm, if you can, Mr. Babb. (Witness raises his arm up partially.)

Q. Take hold of that chair. (Witness endeavors to raise chair, and moves it a little.)

Q. Is that the best you can do with it?

A. Yes, sir. (Witness turns up his sleeve on left arm.)

Q. You may state if there is any feeling in this left arm.

A. Not to amount to anything. I can feel the touch, but cannot feel a pin if stuck in.

Q. Can you lift with that arm?

A. Yes, sir.

To this procedure the defendants interposed an objection on the ground of improper examination of the witness, which was overruled.

It is a too well settled rule in this court to call for further discussion that the plaintiff in an action for damages for personal injuries may be permitted to exhibit to the jury, if he can do so, the contusions and wounds of which they consist. Such is also, we think, the practice in most courts in this country. *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544; *Citizens' Street R. Co. v. Willooby*, 134 Ind. 563; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia. 375. But in *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, it was held that it was not error by the trial court to refuse to permit the plaintiff in such an action to walk across the court room floor in the presence of the jury for the purpose of demonstrating the degree of her lameness. Manifestly there is no means of ascertaining in the case of such an exhibition whether the apparent disability is real or simulated or to what extent it is either, or, in other words, as respects the movements made by the witness, there is no opportunity for cross-examination, and the practice, by well trained witnesses with some histrionic talent, might be the cause of gross impositions upon both the court and the jury. Neither can it ever be necessary to the due administration of justice; and, the nature and extent of the injuries having been proved, it can have no object but to stir the emotions of the jury preparatory to an appeal to their passions and prejudices. But in this case, as we have said, the verdict is not such as to indicate to us that the passions of the jury were so influenced, and we are of opinion, therefore, that the error was without prejudice.

The liquor license bond was executed by the plaintiff in error, the United States Fidelity and Guaranty Com-

pany, as sole surety; and it is contended that the bond and license are both void, because the statute requires that the bond of a licensee shall be signed by two freeholders of the county. This defense, if in any case it would be good as to the company, as to which we express no opinion, is not available to the saloon keeper, because section 11 of the liquor act enacts that unlicensed dealers shall be liable to the public and individuals in the manner and to the like extent as though they had "given bonds and obtained license." As to him, therefore, the question is immaterial. The petition in error is joint, and under a long established rule of this court, the judgment will not be reversed for any error not affecting both parties.

There are numerous other errors assigned having reference to the giving and refusal of instructions and to the conformity of the verdict thereto, and to rulings upon the admission and rejection of evidence, but we think that they are sufficiently treated of, in a general way, in the foregoing discussion, and that nothing of importance would be gained by setting them forth here in detail. Upon a consideration of the whole record, we are of opinion that it discloses no reversible error, and recommend that the judgment of the district court be affirmed.

LEETON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

SUPREME COURT OF HONOR V. CLARA A. TRACY.

FILED DECEMBER 7, 1904. No. 13,662.

Law of Case. The precise question decided by this court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

Tibbets Bros. & Morey and W. B. Risse, for plaintiff in error.

John C. Stevens, contra.

AMES, C.

This case has twice previously been before the court, and in both instances it was extensively briefed, argued at length orally, and at length and formally decided. The first opinion was written by Mr. Commissioner ALBERT, and concurred in by Mr. Commissioner DUFFIE and myself, and is published, unofficially, in 4 Neb. (Unof.) 189. The second opinion was upon a rehearing and written by Mr. Commissioner DUFFIE, and concurred in by Messrs. Commissioners POUND and KIRKPATRICK, and is also published, unofficially, in 4 Neb. (Unof.) 195. The suit is brought for a recovery by the beneficiary of a member of a fraternal benefit life insurance company, and involves an interpretation of the charter and by-laws of the association. A trial in the district court resulted in favor of the association, which by the first decision was reversed and the cause remanded for a new trial. Upon the rehearing the former decision was adhered to and a mandate was issued accordingly. Upon a new trial upon precisely the same record that had been presented in this court, the district court, in strict obedience to the opinions accompanying the mandate, rendered a judgment for the plaintiff, there being no dispute as to the facts, and the sole question of law involved having been determined in the manner above stated by this court. The association now prosecutes this proceeding, alleging, in substance, that the district court erred in obeying the mandate, and seeking to reargue the questions twice previously decided here. Nothing has been brought to our at-

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tention indicating to our minds that the former decisions erroneously interpreted the contract, but, if there had been, we should be of opinion that the precise question decided in this court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

PETER MICHAELSON ET AL., APPELLANTS, v. VILLAGE OF
TILDEN, APPELLEE.

FILED DECEMBER 7, 1904. No. 13,667.

Cities: DETACHING TERRITORY: REVIEW. A judgment of the district court in a proceeding under the statute, section 101, article I, chapter 14, Compiled Statutes, 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Affirmed.*

Mapes & Hazen, for appellants.

F. L. Putney, *contra.*

AMES, C.

This record is of so unusual an aspect that it presents neither an issue of fact nor a dispute of law. The action is a proceeding by owners in severalty of contiguous tracts

of land to procure their detachment from the village of Tilden. The petition was granted as to several of the tracts, but, with respect to two of them lying immediately adjacent to one of the more settled regions of the village, it was denied, and the owners of these tracts have brought the case to this court by appeal. There was no testimony offered on the trial except that of one of the appellants, and no evidence, other than public records, except a plat or sketch of the site of the village attached as an exhibit to the bill of exceptions, and showing the relative positions of some of the neighboring buildings, streets and tracts of land. The statute provides, section 101, article I, chapter 14, Compiled Statutes, 1903 (Annotated Statutes, 8776): "If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly," which either party may have reviewed in this court by appeal or proceedings in error. In the absence of evidence of any specific fact or circumstances tending to impeach the justice of the decree, we do not see how we can intelligibly revise it. It is true that we have a general description in the testimony, and by the exhibit, of the land involved in the dispute, and of the adjacent tracts within the village, but these afford us far less accurate and comprehensive knowledge of the situation and surroundings than were, presumably, possessed by the trial judge, who is not unlikely to have been personally familiar with both, and whose judgment may therefore have been influenced by evidence of the most weighty character which is not reflected from the bill of exceptions. If the record disclosed anything from which it might be contended that the judge committed an important mistake of fact, or had made an erroneous inference of fact or of law, the case would be other than it now is, and might call for a review, and a reversal or affirmance of his findings and judgment; but, although the case is by permission of the statute here on appeal, we do not see how his determina-

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tion can be impeached for want of equity, in the absence of apparent error in some of the respects named.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CITY OF SOUTH OMAHA V. R. JOHN SUTLIFFE, A MINOR.
BY ANNA SUTLIFFE, HIS NEXT FRIEND.

FILED DECEMBER 7, 1904. No. 13,569.

1. **Instruction: MEASURE OF DAMAGES.** Under the issues involved in this case, *held* not error to omit from a general instruction on the measure of damages any reference to the social standing of plaintiff's mother.
2. **Instructions examined, and *held* to not permit a recovery for loss of earnings during plaintiff's minority.**
3. **Evidence: CARLISLE TABLE.** While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may, without such tables, make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue.
4. **Case Distinguished.** *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, examined and distinguished.
5. **Action for Personal Injuries: PLEADING: EVIDENCE.** In actions for personal injuries, it is not necessary to specially allege every indirect injury to each part of the body to lay the foundation for such proof on the trial; such proof may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proved.
6. **Expert Testimony.** When medical testimony is relied upon to prove

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the cause or effect of a physical injury, it seldom goes further than an opinion based on the experience of the witness and the general learning of the profession. Positive statements of fact are seldom indulged in by physicians when testifying as experts, and yet this character of testimony is universally admitted by the courts of this country.

7. **Review.** Actions of the trial court in the exclusion of evidence examined, and *held* not prejudicial.
8. **Remittitur.** Award of damages examined, and *held* excessive; but *held*, further, that such excess may be cured by a remittitur of \$3,000 from the judgment of the lower court.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed upon condition.*

A. H. Murdock, for plaintiff in error.

T. J. Mahoney and *H. C. Murphy*, *contra*.

OLDHAM, C.

This is an action for personal injuries received by plaintiff, a minor of the age of three and one-half years, who was thrown from a seat on the front end of a delivery wagon, in the city of South Omaha, and injured in a manner which will be hereafter described. The suit was brought by his foster-mother, as next friend, against the city of South Omaha, and resulted in a verdict and judgment for \$10,000 damages, and to reverse this judgment the defendant city brings error to this court.

The facts underlying this controversy are that, when about one year old, plaintiff was abandoned by his father and mother, Richard and Cora Hooten, and given into the care and control of his aunt, Mrs. Anna R. Sutcliffe, who, subsequently, legally adopted the child as her own. Mrs. Sutcliffe resided with the plaintiff at the village of Bellevue, Nebraska, about six miles distant from the defendant city. On the morning of the injury (July 17, 1902) she left the plaintiff with his brother, who was about six years old, at her home in Bellevue, and went on

business to Omaha and Council Bluffs; after she had gone, a young man by the name of Lee, who was acquainted with the children, asked them to ride with him in his delivery wagon to South Omaha. The seat on the delivery wagon extended out to, and even with, the front end of the wagon. The plaintiff sat in the middle of the seat between the driver and his older brother. In this manner they rode to the city and transacted such business as the driver had in charge, and on the return home, while driving along 24th street of the defendant city, the front wheel of the wagon went into a deep ditch, or gully, which had remained for a long time in the street, and which was obstructed from view by muddy surface water, and, as a result of this accident, plaintiff was thrown forward with his head immediately in front of the wheel of the wagon, which passed over the right side of plaintiff's head, tearing off the scalp, commencing at the corner of the right eye, and passing in a semicircle upward and downward to a point above and behind the right ear, at the highest point of the semicircle abrading the periosteum to the extent of about one-half inch, turning the scalp down over the plaintiff's ear, and grinding the filth from the street into the wound. After the injury, plaintiff received prompt and efficient medical treatment at the hospital, and later at his home. This treatment was continued for a period of two months, and until the child became convalescent.

There is no complaint in the brief of the defendant city as to the sufficiency of the evidence to establish its liability for the injury, but its very able and exhaustive brief is directed entirely to an attack on the instructions of the trial court on the measure of damage, and to the rulings of the court on the admission and exclusion of testimony bearing on this question. We will examine these complaints as nearly as possible in the order in which they are presented in the city's brief.

The city in its answer alleged in mitigation of damages that plaintiff's mother was a woman without character

or reputation, and had abandoned plaintiff when he was one year old. This allegation was conceded to be true, and it is urged that the court should have given this admission in instructions to the jury to be considered in estimating the quantum of plaintiff's damage. There are two sufficient reasons, we think, why the court did not err in including this admission in his general instruction on the measure of damages. One is that plaintiff did not allege in aggravation of damages any injury to his social position, and the other is that the city did not request an instruction submitting the question of the social standing of plaintiff's parents to the jury; and, again, plaintiff's social status would be affected rather by the reputation of his adopted parent than by that of his mother, under the admitted facts in this case.

It is next objected that the instruction stating the issues to the jury did not point out clearly what the material issues were. An examination of the record shows that no exception was taken to the two instructions setting out the issues. In addition to this, however, we think that the issues were fairly and clearly set out in these instructions.

The next complaint to which our attention is directed is as to the action of the trial court in giving paragraph 11 of instructions on its own motion. This instruction is as follows:

"If you find for the plaintiff, it will be your duty to determine from the evidence the amount of his damages, which should be actual compensation for his injuries. In doing so, you should carefully consider from the evidence, the nature, extent and character of the injuries sustained, you should also determine whether or not the injuries to the plaintiff are permanent, and you should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future. You should allow him such damages for bodily pain and mental anguish as under the evidence you believe him entitled to, and you should allow him such damages for

physical and mental disability, if any such there be, as from the evidence you believe him entitled to. The law establishes no rule by which to fix the amount of damage for bodily pain and mental anguish, but leaves it to you to determine from the evidence the reasonable amount thereof. If you should find from the evidence that the plaintiff will suffer damage by reason of impaired capacity to earn money, if any such impaired capacity you find, then, in estimating this element of the plaintiff's damage, you must bear in mind the fact that under the law the plaintiff would not be entitled to his earnings until after he became 21 years of age, and you should not allow plaintiff any damages for what he might otherwise have earned before coming of age. There is no testimony in this case upon which you can allow plaintiff anything for expenses occasioned by his injuries."

It is alleged against this instruction that it permits the jury to award damages for the loss of earning capacity during the minority of the child, because of the clause which says: "You should allow him for all damages which naturally and directly result from his injuries, whether in the past or in the future." This reference to the future is interpreted as an authority for allowing damages for loss of earning capacity during minority. But this, to our minds, is a very strained and unreasonable construction of the charge. The portion of the charge in which this clause appears was directed to general damages which might be allowed if the injuries were shown to be permanent in their nature. The portion of the instruction which treats of the loss of earning capacity follows this in its logical order, and plainly and unmistakably tells the jury that they shall not consider any loss of earning capacity during the minority of the child.

It is also urged that there is no evidence in the record to sustain the charge as to the loss of earning capacity after plaintiff had reached his majority. This contention is based on the proposition that neither the Carlisle table

nor any other recognized tables of the expectancy of life were introduced by the plaintiff to show what his expectancy might be, and that consequently there was no testimony from which the jury would be justified in finding that he would ever arrive at the age of 21 years. While the Carlisle and other mortuary tables of accepted accuracy and in general use are always properly admissible in evidence for the purpose of aiding a court or jury in determining the probable expectancy of life, when such fact is in issue, yet, when admitted, these mortuary tables are not binding upon the estimate of the triers of such fact. They may without such table make their own estimate from the age, health, habits, physical condition and appearance of the person whose expectancy is at issue. *Deisen v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 454, 45 N. W. 864; *Beems v. Chicago, R. I. & P. R. Co.*, 67 Ia. 435, 25 N. W. 693; 2 Sutherland, Damages (3d ed.), 455; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491.

It is further urged that the instruction is erroneous in failing to inform the jury that only such future damages can be allowed as are established with reasonable certainty. In support of this contention the decision of this court in *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, is cited. An instruction in this case was condemned by this court because it permitted the jury to consider such injuries as plaintiff "may hereafter suffer," it being held that, to charge a jury so as to allow damages to the plaintiff that he *may hereafter suffer*, opens a wide field of speculation, and permits an award based on conjecture rather than on specific proof. But the instruction in the case at bar we do not think obnoxious to this objection, for the charge limits the award of damages to such as "naturally and directly result from his injuries." In other words, it limits the recovery to such damages as the jury believed did actually result from the injury. The court further said: "If you should find from the evidence that the plaintiff will suffer damages by reason of

impaired capacity of earning money," etc. Here there is no field for speculation or conjecture, as the jury under the direction of this charge must first find that plaintiff "will," and not that he "may," suffer damages, before making him any award.

For the purpose of examining the alleged errors committed by the trial court in the admission of evidence offered by plaintiff touching on the measure of damages, it is necessary to refer to the allegations of the petition with reference to the injury. The petition, after describing with particularity the injuries received by plaintiff, alleges that one of the parietal bones was caused to press downward upon the brain of plaintiff, thereby causing serious, dangerous and permanent injuries to body and mind. It also alleges that plaintiff's bodily health and mental condition have been seriously, dangerously and permanently impaired; that prior to the injuries plaintiff was an exceedingly bright boy, but that since the injuries he has become desultory and dull, and his mental and bodily activity has greatly deteriorated. Under this and other similar allegations plaintiff was permitted to show, over the objection of the defendant, that before the injury he could speak plainly, but that since the injury he was unable to speak without stuttering. That before the injury he was left-handed, but that since the injury he had changed from the use of his left to that of his right hand. That before the injury he had perfect control of his bladder, but that since the injury he had lost this control. It is urged against the admission of this testimony that plaintiff could not show those alleged injuries under the general allegations of the petition, and that, to render this testimony competent, there should have been a particular allegation of damages arising from each of these causes in the petition. The expert testimony offered by plaintiff tended to show that each of these effects were the logical result of the injury to the brain functions caused by pressure upon the brain by the parietal bone. In other words, if the plaintiff's medical experts were

correct in their conclusions, the change from left-handedness to right-handedness was occasioned by the partial loss of muscular control of the left side of the body, occasioned by the pressure on the right side of the brain; and the stammering and loss of control of the bladder came from the same cause; in short, that these manifestations were symptoms which tended to show an impairment of the brain functions caused by the accident. In actions for personal injuries, it is not necessary to specially allege every injury to each part of the body, to lay the foundation for such proof on the trial; such evidence may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proved. In *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N. W. 1124, the petition alleged an injury to one eye. The court received evidence showing an impairment of the other eye as one of the results of the injury. It was held, on review, that this was not erroneous, the court saying that "it could see no reason why evidence as to all the injury to plaintiff which followed naturally from the destruction of the left eye was not competent." To the same effect are the holdings in *Williams v. Oregon Short-Line R. Co.*, 18 Utah, 210, 54 Pac. 991; *Missouri, K. & T. R. Co. v. Edling*, 18 Tex. 171, 45 S. W. 406; *Quirk v. Siegel-Cooper Co.*, 56 N. Y. Supp. 49.

It is further urged against the admission of this testimony that the medical experts introduced by plaintiff only testified that, in their opinions, these effects were produced by the injury to the brain, and that they did not positively trace them to such injury. When medical testimony is relied upon to prove the cause or effect of a physical injury, it seldom goes further than an opinion based on the experience of the witness and the general learning of the profession. Positive statements of fact are seldom indulged in by physicians when testifying as experts, and yet this character of testimony is universally admitted by the courts of this country. *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn. 511, 39 N. W. 485;

Block v. Milwaukee Street R. Co., 89 Wis. 371; *Turner v. City of Newburgh*, 109 N. Y. 301; *Lehigh & H. R. Co. v. Marchant*, 84 Fed. 870.

The next alleged error called to our attention is that with reference to the action of the trial court in excluding certain testimony offered from the deposition of Dr. Betts by the defendant. The evidence offered bore, if at all, very remotely on the measure of damage, and much of it was clearly incompetent. When objections were sustained to the questions propounded, defendant did not offer the answers contained in the depositions, and have a ruling of the court on such offer. Under the well-established rule of this court, when testimony is offered, and an objection is made and sustained to a question propounded, the party offering the evidence must follow the question with the offer of proof, to entitle him to a review of the ruling of the district court by this tribunal. Objections as to other evidence excluded are wholly unfounded, and do not require a further discussion.

After a careful review of the record in this case, we have failed to find any errors prejudicial to defendant in the trial of the cause, unless it be in the amount of damages awarded by the court and jury. It is plain that in suits of this nature, where the burden of the damage awarded falls upon the taxpayers of a city or village, who are, at most, only very indirectly responsible for the negligence occasioning the injury, the award should be confined strictly to such damages as are plainly compensatory. We also fully recognize that there is no rule by which an injury, such as the evidence in this case shows plaintiff to have suffered, can be estimated in dollars and cents. However, after much hesitation, and a careful review of the testimony bearing on the nature and extent of plaintiff's injury, we are inclined to think that the damages awarded are somewhat excessive. It appears to us that the evidence fairly shows that plaintiff, as a result of his injury, will bear a foreboding looking scar on his head and face during his natural life; that he may

suffer a partial paralysis of his left arm permanently; that the stammering and loss of control of the bladder are temporary injuries which time will cure; and that he has suffered great bodily pain and anguish from his injuries, but that this is of temporary and not permanent duration. Considering all these results of the injury, we think a \$10,000 verdict against the city smacks somewhat of smart money, and is excessive.

We therefore recommend that, unless plaintiff enter a remittitur of \$3,000 from the judgment awarded in the district court within 30 days from the filing of this opinion, the judgment of the district court be reversed and the cause remanded for further proceedings. But that if such remittitur is filed the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings, unless the plaintiff enter a remittitur of \$3,000 within 30 days of the filing of this opinion; and it is further ordered that if such remittitur be filed the judgment of the district court be affirmed.

JUDGMENT ACCORDINGLY.

MARY J. BIXBY V. BARBARA E. JEWELL, ADMINISTRATRIX.

FILED DECEMBER 7, 1904. No. 13,653.

1. **Executors and Administrators: SALE OF REAL ESTATE: REVIEW.**

In a statutory proceeding for a license to sell real estate by an administrator or executor, where no motion for a new trial is filed in the court below, we will, on error proceedings, examine the sufficiency of the pleadings to sustain the judgment.

2. **Special Proceeding.** An application to the district court by an

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executor or administrator for license to sell real estate is not a suit in equity but a special statutory proceeding.

3. **Homestead, Sale of: VALIDITY.** A homestead of less value than \$2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon or for payment of debts against the estate of the decedent, and a license granted by the district court purporting to authorize such a sale is absolutely void. Following *Tindall v. Peterson*, 71 Neb. 160.

ERROR to the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed.*

Mockett & Polk, for plaintiff in error.

George A. Adams, *contra*.

OLDHAM, C.

In this case Barbara E. Jewell, administratrix of the estate of Alexander Jewell, deceased, filed a statutory petition in the district court for Lancaster county for a license to sell the real estate of her intestate for the payment of the debts of the estate. Mary J. Bixby, one of the heirs at law of the decedent, filed objections to the issuing of a license on several grounds, the only one of which it will be necessary to examine is the 4th objection, which is as follows:

"This objecting heir further shows to the court that the farm of 156.88 acres was the homestead of decedent and his family at the time of his death, on or about February 7, 1897, and was at said time occupied by the decedent and his family as a homestead, and immediately upon his death the homestead right to the extent of \$2,000 in said land descended to the widow, Barbara E. Jewell, for her lifetime, and upon her death to the children of Alexander Jewell, deceased, free and clear from all debts contracted by said decedent in his lifetime, and that said homestead is not liable for the payment of any claim set out in the petition filed herein."

The administratrix, by way of reply to these objections,

alleged that the objections were insufficient and did not state facts sufficient to stay the issuing of an order as prayed for in the petition; that the claim set out in the petition of \$5,611 and interest is a prior claim against the estate, in that the larger portion of the money was furnished by the judgment creditor and claimant for the payment of mortgages and liens against said estate, and he is entitled to be and is subrogated by the order of this court to the rights of the mortgagees therein, which said mortgages were executed, signed and delivered by the said Alexander Jewell, deceased, and his wife so as to become and were liens upon and against said estate, and that the claimant in said claim, being subrogated thereto, is entitled to have said real estate sold, notwithstanding it may have been the homestead of the deceased. In other words, the reply admits the allegation of the objector that the lands were occupied as a homestead by the deceased at the time of his death, and have been since occupied as such by his widow and heirs. On issues thus joined, the district court found that the claims of Parkason J. Jewell and Zenith J. Jewell, amounting to \$5,611, were for money furnished the estate for the payment of a mortgage and other liens, which existed prior to the death of Alexander J. Jewell, and were liens against said estate at the time of his death; that the homestead rights of the widow and family of the decedent are subject and inferior to the claim of said Parkason J. Jewell and Zenith J. Jewell. The decree grants the license, directs the property to be sold subject to the dower interest of the widow, which is to be subsequently determined on the coming in of the report of the sale; and, to reverse this judgment, Mary J. Bixby brings error to this court.

No motion for new trial was filed in the court below, and the only question we shall examine is as to the sufficiency of the pleadings to sustain the judgment. Under section 17, chapter 36, Compiled Statutes, 1903 (Annotated Statutes, 6216), the homestead descends to the survivor for life, and afterwards to his or her heirs forever, subject

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only to the claims enumerated in the chapter, which are mechanics', laborers' and vendors' liens, and debts secured by mortgage as set out in section 3 of this chapter. The petition for a license to sell the real estate did not allege that any of the debts for which the license to sell was prayed were either mortgages or other statutory liens on the homestead. It is true the administratrix attempted to supply this averment by an allegation in her reply to the objections, yet the allegation only goes so far as to say that certain of the claims had been advanced by the claimant therein named for the payment of mortgages and other liens existing on the homestead before the death of the intestate. If, as alleged in the reply, the claimants therein named have paid mortgages and other liens existing against the homestead in the lifetime of the decedent, and the circumstances were such as to entitle them to be subrogated to the rights of the mortgagees or other lienholders, such claims, in a proper suit instituted for that purpose, may be enforced by a decree foreclosing the liens to which they have been subrogated; but these claimants have filed no pleadings of any kind in this proceeding, and, consequently, so much of the judgment and decree of the district court as declares the liens of these two claimants prior to the homestead right of the widow and heirs in the lands sought to be sold is wholly unsupported by the pleadings. In *Poessnecker v. Entenmann*, 64 Neb. 409, we held that the application to a district court by an executor or an administrator for license to sell real property is not an action in equity but a special statutory proceeding; and, again, in *McClay v. Foxworthy*, 18 Neb. 295, we held:

"A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem*, where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same."

Under this view of an application for license to sell real estate by an administrator, the only questions which should be determined in the proceeding are the amount of the indebtedness against the estate, the amount of personal property available for the payment of such debts, and the necessity to sell the land, and the character of the estate which is sought to be charged with the payment of the debts. When it was made to appear by the objections filed by one of the heirs and the reply of the administratrix that the estate sought to be sold was impressed with the character of a homestead, the court was without authority to proceed further until the homestead right had been admeasured and its value determined. In the recent case of *Tindall v. Peterson*, 71 Neb. 160, AMES, C., speaking for the court says:

"A homestead of less value than \$2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is purely void."

We therefore conclude that the judgment of the district court decreeing the sale of the homestead, and declaring the alleged incumbrances of the claimants therein recited superior to the homestead right is unauthorized and void, and we therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings in conformity with this opinion.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings in conformity with this opinion.

REVERSED.

JACOB THULL V. HARRY ALLEN.

FILED DECEMBER 7, 1904. No. 13,660.

Evidence examined, and held sufficient to sustain the judgment of the district court.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Millard & Snider, for plaintiff in error.

B. Ready, contra.

OLDHAM, C.

This was an action in forcible entry and detainer. Plaintiff had judgment of restitution in the court below, and defendant brings error to this court.

The first question called to our attention in the brief of plaintiff in error is that the evidence is not sufficient to sustain the judgment. It appears from the testimony in the bill of exceptions that defendant had leased the premises in dispute, in writing, for a period of one year from the first day of April, 1901, with the privilege of remaining another year if the premises were not sold. It appears that defendant had availed himself of this privilege and remained on the premises until the first day of April, 1903. On the 15th day of April plaintiff served notice, in writing, on defendant to surrender possession of the premises. This notice is offered in evidence, as well as the lease, and it was admitted in open court that plaintiff was the owner of the premises, and that defendant was in possession at and after the beginning of the suit. We think this evidence sufficient to sustain the judgment of the trial court. The presumption that defendant was holding by permission of the landlord after the expiration of the lease was fully overcome by the proof of the service of the notice to quit on the defendant. The evidence

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showed that plaintiff prosecuted his suit diligently after the service of the notice, and there was nothing to indicate an acquiescence in defendant's wrongfully holding over.

It is further contended in the brief of plaintiff in error that the judgment of the district court is contrary to law, because the evidence shows that plaintiff had waived the breach of the lease by commencing a suit against the defendant for rent after instituting his suit of unlawful detainer. It appears from the record that the defendant in the court below laid the foundation to introduce the record of a subsequent suit for rent instituted by plaintiff against the defendant in the county court of Cedar county, but, after laying the foundation for this proof, the defendant neglected to offer the record of this proceeding, and counsel for plaintiff and defendant now dispute as to whether the suit for rent in the county court was for rent that accrued before or after the forfeiture. Without the record we are unable to determine this contention. These are the only two objections we have been asked to examine, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES P. MICHAELSON V. ALLEN D. BEEMER, WARDEN.

FILED DECEMBER 7, 1904. No. 13,975.

1. **Habeas Corpus. VOID JUDGMENT.** The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity. Following *In re Fanton*, 55 Neb. 703.

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2. **Jurisdiction.** The judge of a district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused.
3. **Void Commitment.** Where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime before a court of competent jurisdiction, on a habeas corpus proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

T. J. Doyle and Bishop & Anderson, for plaintiff in error.

Frank N. Prout, Attorney General, and Norris Brown, contra.

OLDHAM, C.

On the 31st day of August, 1904, plaintiff in error was tried at a special term of the district court for Garfield county on a charge of grand larceny, and was found guilty and sentenced to one year's confinement in the penitentiary of Nebraska. No jury was impaneled at the trial, the state and prisoner agreeing to waive a jury. On October 6, 1904, an application for a writ of habeas corpus was made to one of the judges of the district court for Lancaster county for the release of the prisoner from the custody of the warden of the penitentiary. The application was denied, and the prisoner remanded to the custody of the warden, and from this order he prosecutes error.

There are no disputed facts in the record, and it shows that the prisoner was properly informed against by the county attorney of Garfield county on a charge of grand larceny; that he was duly arraigned, and tendered a plea of not guilty to this charge; that, by the consent of the

prisoner and the county attorney, a jury was waived and a trial had to the judge of the district court, which resulted in a verdict of guilty, and sentence by the court to one year's confinement in the penitentiary, and that the warden is holding the prisoner on a commitment issued on this judgment and sentence.

The first question presented is as to whether habeas corpus will lie in the case at bar, no error proceedings having been instituted for the purpose of reversing the judgment of the district court, on which the commitment was issued. We have frequently held that the writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for the plea of a writ of error. This rule is well stated in the case of *In re Fanton*, 55 Neb. 703, in which we held:

"The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity."

This doctrine is supported by an unbroken line of authorities in both the federal and state courts of this nation, and consequently the question we are confronted with at the threshold of this controversy is, was the judgment and sentence of the district court absolutely void or only erroneous? The prisoner contends that the sentence and judgment were absolutely void, and the warden, through his counsel the deputy attorney general, contends that they were merely erroneous. To determine the construction of the constitution and statutes bearing upon the contention whether or not a citizen of this state charged with a felony or infamous crime may waive his right to a trial by a jury, it is proper to examine the public policy of the state with reference to the trial of persons charged with such offenses. The public policy of the state is always reflected from its constitution, its statutes and the decisions of its court of last resort. Section 3, article I of the constitu-

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tion of Nebraska, provides: "No persons shall be deprived of life, liberty or property, without due process of law." Section 6, article I, provides: "The right of trial by jury shall remain inviolate." Section 11, article I, also provides, among other things, that in all criminal proceedings the accused shall have the right to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Section 296 of the code provides for the waiver of a jury in civil cases. There is no provision, however, in the code of criminal procedure for such waiver of a jury, but section 466 of the criminal code provides: "In all criminal cases, except as may be otherwise expressly provided, the jury summoned and impaneled according to the provisions of the laws in force relating to the summoning and impaneling of juries in other cases shall try the accused." In construing this provision of the statute we held in *Arnold v. State*, 38 Neb. 752:

"The statute was designed for the protection of the state as well as the prisoner. His consent could not change the law. The rights given him by a statute he could not waive; and, even by agreement with the state's prosecutor, the tribunal which the law provided for the trial of this issue could not be set aside and some other tribunal substituted."

This doctrine is supported by a long line of well considered cases in the various states of this Union, among which may be cited *State v. Carman*, 63 Ia. 130, 18 N. W. 691; *Cancemi v. People*, 18 N. Y. 128; *Harris v. People*, 128 Ill. 585, 21 N. E. 563; *State v. Lockwood*, 43 Wis. 403; *Williams v. State*, 12 Ohio St. 622; Cooley, Constitutional Limitations (7th ed.), 458; *Ex parte Smith*, 135 Mo. 223. If, then, the only tribunal provided by the constitution and laws of the state of Nebraska for the trial of one charged with a felony is a court and jury, it follows that the parties cannot by agreement constitute some other tribunal for this purpose. Consent of parties can waive jurisdiction of the person, but the law alone confers juris-

diction of the subject matter. If parties by consent could confer jurisdiction on a judge of a district court, which is withheld by the constitution and statutes of the state, then, by the same agreement, they might confer on a committing magistrate the jurisdiction to try and finally determine the guilt or innocence of one charged with a felony at his preliminary examination. When the information was filed in the district court for Garfield county charging in statutory language the prisoner with the offense of grand larceny, and he came into court either voluntarily or under the custody of the sheriff, the court became possessed under the laws of the state with the jurisdiction of the person of the defendant, and was authorized to make such orders touching the arraignment of the prisoner, his admission to bail, or commitment in default of bail, as the statute provides. But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the constitution and laws of this state that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence based on such judgment was a mere nullity and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the district court as remanded the prisoner to the custody of the warden of the penitentiary is erroneous, and should be set aside.

It does not follow, however, as contended by counsel for the prisoner, that because the commitment under which the warden detains the prisoner is insufficient, the prisoner should be discharged from further proceedings, for it is

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provided by section 358 of the criminal code, which governs habeas corpus proceedings, among other things: "When the said judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from said confinement. And in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons." Now, it clearly appears that an information properly charging the offense of grand larceny, to which the prisoner has pleaded not guilty, is pending against him for trial before a duly authorized tribunal in Garfield county, and the rule covering such case is that, if the commitment on which the prisoner is detained is insufficient, the court on habeas corpus will discharge the prisoner from that commitment, and will recommit him to the custody of the court having jurisdiction of the offense properly charged by indictment or information against him. *Ex parte Bennett*, Fed. Cas. No. 1,311, 2 Cranch (C. C.), 612; *In re Ring*, 28 Cal. 247; *Miller v. Snyder*, 6 Ind. 1; *In re Mason*, 8 Mich. 70; *Ex parte Badgley*, 7 Cow. (N. Y.) 472.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the judge of the district court for Garfield county, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court for Garfield county to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district court for Garfield county, as provided by section 358 of the criminal code, and that in default of the recognizance so

directed the prisoner be committed to the jail of Garfield county, there to remain until discharged by due process of law.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the judge of the district court for Garfield county, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court for Garfield county to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district court for Garfield county, as provided by section 358 of the criminal code, and that in default of the recognizance so directed the prisoner be committed to the jail of Garfield county, there to remain until discharged by due process of law.

JUDGMENT ACCORDINGLY.

FRONTIER STEAM LAUNDRY COMPANY V. JAMES P.
CONNOLLY.

FILED DECEMBER 7, 1904. No. 13,591.

1. **City Ordinance: BREACH: LIABILITY.** Whether a liability arising from a breach of a duty prescribed by statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, depends upon the nature of the duty enjoined and the benefits to be derived from its performance.
2. ———: **FIRE PROTECTION.** An ordinance which requires the placing of fireproof shutters upon the windows of brick buildings within

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a city imposes a duty for the purpose of giving to the public protection against fire which the common law did not provide.

3. —: **LIABILITY.** Where in such city one is in possession of property as bailee, and it is destroyed by fire which spread from another building through windows unprotected by fireproof shutters, he is not liable for the value of such property by reason of the fact that he owned the building and that no fireproof shutters were provided as required by the ordinance.

ERROR to the district court for Douglas county: **GUY R. C. READ, JUDGE.** *Reversed.*

B. N. Robertson, for plaintiff in error.

W. H. Herdman, contra.

LETTON, C.

This is an action to recover the value of certain articles of personal property which had been delivered to the plaintiff in error, the Frontier Steam Laundry Company of the city of Omaha, for the purpose of being laundered, and which were destroyed by fire which spread to the premises of the steam laundry company from an adjoining building. The delivery of the goods to plaintiff in error for the purposes claimed is admitted by the pleadings, but the plaintiff in error asserts that it exercised due care and caution in the possession and preservation of the property, and that without its fault or negligence a fire which originated on the adjoining premises spread to its premises and destroyed the goods. It denies that it is responsible for the fire, or that it has been guilty of negligence in any manner in the care of the property. A paper marked "Reply" found among the files does not appear to have been filed, but since at the time of the trial leave was given to file a reply, and since the court in its instructions treated the issues as if this paper had been filed, we will consider the case as if the issues had been made up by the filing of the reply. The reply alleges that the negligence charged consisted in this: that the premises were

within the fire limits of the city of Omaha, that the buildings had windows within 40 feet of each other which were not covered by fireproof doors or shutters, as required by ordinance No. 4858 of the city of Omaha; that, by reason of the defendant's failure to cover said windows with fireproof shutters, the fire entered the defendant's premises and destroyed the plaintiff's property; that the fire entered only through the windows, and that, had the windows been covered with fireproof shutters, the fire would not have entered, and the goods of the plaintiff would not have been destroyed.

It may be questioned, under the evidence in this case, whether or not the ordinance which was introduced in evidence and which provided that fireproof shutters should be placed on the windows of brick buildings was of any force or effect as against the plaintiff in error, since the building appears to have been constructed long prior to the passage and approval of the ordinance, and it being penal in its nature could not be retroactive in its effect. This question, however, has not been distinctly raised in the case, and will not be decided. Assuming then that the ordinance was effective as to the premises, it remains to be seen whether or not a violation of its provisions constituted such negligence on the part of the plaintiff in error as would make it liable to persons whose goods were in its custody as bailee, and were destroyed by fire communicated through the unprotected openings. The only remedy provided by the ordinance for a breach of its provisions is a penalty of not less than \$10 nor more than \$100. It may be said that generally the penalty provided for a breach of the condition of an ordinance is the only one recoverable, but there is a further principle which is applicable in such cases, and that is that evidence of the violation of an ordinance usually tends to show actionable negligence where the consequences have ensued from its violation which are contemplated by the ordinance. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29. Wherever a statute or ordinance creates a duty or obligation, though

it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident, but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined and the benefits to be derived from its performance. *Taylor v. Lake S. & M. S. R. Co.*, 45 Mich. 74; *Hayes v. Michigan C. R. Co.*, 111 U. S. 228, 240; 2 Cooley, Torts (3d ed.), 658; *Cook v. Johnston*, 58 Mich. 437, 25 N. W. 388. If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case.

What then is the purpose of the enactment of the section under consideration? Is it for the benefit of the public at large, for the public safety, or is it for the benefit of persons whose property may be burned in buildings not provided with fireproof shutters? We are satisfied that the purpose of section 53 of the ordinance which requires the erection of fireproof doors and shutters upon brick buildings within the city is to protect the general public against the spread of fire. A fire which may inflict but a small amount of damage when confined to the place

of its origin, if allowed to spread, increases in intensity as it continues its career, and may, unless seasonably checked, inflict incalculable damages upon individuals and upon the public at large. The safety of life and property in large cities demands such precautions against the spread of flames as the ordinance requires. Ordinances prescribing such safeguards and protective appliances are everywhere upheld as a proper exercise of the police power of the municipality, exercised for the safety of the people and the preservation of their property. Their purpose, while it may incidentally benefit the individual who is required to thus safeguard his building, is for the benefit and safety of the public at large. They are not enacted primarily for the purpose of preserving buildings endangered by fire to the owners thereof, for, if a man neglects to protect his own property from fire, or if he chooses to destroy it himself, it is not the concern of the lawmaking power, so long as in so doing he does no act which affects the rights and privileges of other persons; nor are they enacted to make the owners of buildings who neglect to comply with such provisions liable for the loss by fire which may have spread to such buildings of the property of other persons contained therein. Under the view we take of the purpose of this portion of the ordinance, no liability attaches to the plaintiff in error on account of the destruction of the property, the value of which it is sought to recover in this action.

For these reasons, we recommend that the judgment of the district court be reversed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

SEDGWICK, J., dissenting.

It is, and without doubt correctly, considered in the opinion that we are committed to the rule declared in

Omaha Street R. Co. v. Durall, 40 Neb. 29, that the violation of any statutory or municipal regulation, established for the purpose of protecting persons or property from injury, is evidence of negligence, when the other elements of actionable negligence concur. It is said in the opinion: "If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had, but where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence." It is also said: "In some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence." So that the holding in this case is that to protect the personal and property rights of individuals is no part of the object of the ordinance. To this proposition I cannot agree. The opinion finds the object of the ordinance to be "for the benefit of the public at large," that is, for the public safety, and it is directly stated in the opinion that "the purpose of section 53 of the ordinance which requires the erection of fireproof doors and shutters upon brick buildings within the city is to protect the general public against the spread of fire." To protect the general public against the spread of fire is to protect the property of the people of the city generally from destruction by fire, and if the object is to protect the property of all of the people of the city, it certainly must be a part of the object to protect the property of each individual citizen.

2. While some of the principles announced, and the reasoning from which they are derived, seem to me to be wrong, the conclusion may, I think, be justified upon another ground. An ordinance, the effect of which may be to place so great a responsibility upon a citizen, and

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which is penal in its nature, must be strictly construed. It ought not to be held to apply to buildings erected before its enactment unless its language plainly compels such a construction. The ordinance provides: "All brick buildings, except dwelling houses, schoolhouses, churches, and all strictly fireproof buildings, shall have fireproof shutters on every entrance on the rear walls and courts, with openings within 40 feet of each other; such shutters to be constructed to the satisfaction of the building inspector and chief of the fire department." This language might possibly be construed so as to apply to buildings constructed before its enactment, if it were not for the plain language of the title of the ordinance, which must be construed with it, and which seems to limit its effect to buildings constructed after its enactment. It is entitled "An ordinance regulating the construction of buildings and providing penalties." I do not think that the provisions of this ordinance could be so extended by construction as to impose a penalty and such severe consequences for a failure to protect with iron shutters the windows of buildings that had already been constructed when the ordinance was enacted.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. AXSEL HAGBLAD.*

FILED DECEMBER 7, 1904. No. 13,623.

1. **Petition: SUFFICIENCY.** Petition examined, and *held* not to state a cause of action *ex contractu* against a common carrier, nor a cause of action at common law for the carrier's negligence.
2. ———: **PASSENGER.** Petition further examined, and *held* not to set forth facts sufficient to constitute the plaintiff a passenger so as to bring him within the provisions of section 3, article I, chapter 72, Compiled Statutes, 1903.

* Rehearing allowed. See opinion, p. 790, *post*.

3. **Carriers: DUTIES.** A railroad company owes only ordinary care to persons impliedly invited upon its platform who are not passengers.
4. ———: **PASSENGER.** In order to bring a person within the station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage and thus place himself in the carrier's charge.
5. **Pleading.** In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is necessary that the facts stated show that the person suing is one of the class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient.
6. **Passenger.** From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

ERROR to the district court for Holt county: **WILLIAM H. WESTOVER, JUDGE.** *Reversed.*

Benjamin T. White and J. B. Shecan, for plaintiff in error.

M. F. Harrington and A. F. Mullen, contra.

LETTON, C.

This action was brought by Axsel Hagblad, defendant in error, hereinafter styled the plaintiff, against the Fremont, Elkhorn & Missouri Valley Railroad Company, plaintiff in error, hereinafter styled the defendant. Judgment was rendered for the plaintiff below, and the defendant below brings error to this court. The sole error as-

signed is that the trial court erred in overruling the defendant's motion for a judgment on the pleading *non obstante veredicto*. The defendant, by a general demurrer, by seasonable objection to the introduction of evidence upon that ground, by motion for an instruction, and by motion for judgment *non obstante veredicto*, at every stage of the case challenged the sufficiency of the allegations of the petition to state a cause of action against the defendant. The parts of the petition which are necessary to be set forth, in order to state the question involved, are as follows:

"1. The plaintiff for cause of action alleges that the defendant is a corporation duly organized under the laws of the state of Nebraska, and has been such corporation for ten years last past; that the defendant is a corporation engaged in the railroad business, and for ten years last past it has been a common carrier of passengers for hire upon its railroad, and has owned and operated a line of railroad in the counties of Madison, Antelope and Holt in the state of Nebraska; that Norfolk and Meadow Grove are stations upon the defendant's line of railroad in Madison county where it receives and delivers passengers on and from its trains, and that the defendant on the 28th day of December, 1902, was a common carrier carrying passengers from Norfolk to Meadow Grove, and that the station at Norfolk where such passengers are received is commonly known as Norfolk Junction.

"2. That on the 28th day of December, 1902, the plaintiff purchased from the defendant at Norfolk, Nebraska, a ticket entitling him to a safe passage on the defendant's train from Norfolk to Meadow Grove, and insuring him against injury while a passenger on said train and while a passenger on the defendant's premises at Norfolk; that while plaintiff was standing on the defendant's station platform at Norfolk on the evening of said day, and after he had purchased and paid the defendant for said ticket, and while he was a passenger on the defendant's premises, and while he was waiting for the arrival of the defendant's

train which was to carry him from Norfolk to Meadow Grove, he was struck by an engine and cars run and operated upon the defendant's railroad track at Norfolk, and which train was under the direction and with the knowledge, approval and consent of the defendant. That by being struck by said engine and said cars the plaintiff was thrown down, mangled, bruised and injured, and sustained the following injuries."

It will be observed that the petition does not allege that any act was negligently done. If the action had been brought against an individual for damages occasioned by his negligence which resulted in the injuries complained of, it would be essential to allege that the injuries were occasioned by the negligence of the defendant, either by setting forth facts which would constitute negligence as a matter of law, or by pleading generally that the defendant was negligent in performing or omitting to perform the acts complained of as constituting negligence. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456. The allegations of the petition under consideration do not set forth that the act by which the plaintiff was injured was done negligently, and no fact is alleged which constitutes negligence as a matter of law under the common law, nor by statute unless the plaintiff was one of a class embraced under the provisions of section 3, article I, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10039), relating to injuries to persons while being transported over railroads in this state. Since the petition was assailed at every stage in the progress of the cause, the pleader will be presumed to have stated his case as fairly to himself as the facts will warrant, and the familiar rule applied that the allegations in the petition and all presumptions arising therefrom will be construed against the pleader, and no presumptions in his favor indulged in. Having these rules in mind, therefore, it will be observed that the only allegations of the petition which show the manner in which the plaintiff was injured are that, while plaintiff was standing on defendant's station platform at

Norfolk on the evening of December 28, 1902, he was struck by an engine and cars run and operated upon the defendant's railroad track, which train was run under the direction and with the knowledge, approval and consent of the defendant. That, by being struck by said engine and cars, the plaintiff was injured. Taking these allegations alone, without the aid of any presumptions, they appear to be somewhat inconsistent. The plaintiff, while standing on the platform, was struck by the engine and cars operated upon the track. The plaintiff stood presumably upon a safe and properly constructed platform, the engine and cars were presumably properly constructed and properly operated, and the track was presumably in good condition for the purpose of its construction. If we accept these facts as true, then, unless the plaintiff was so situated at the time of the accident that, though he was standing upon the platform, his body projected over the track in such manner that properly constructed and operated engine and cars might strike him, no injury could result. This being the case, the inference must be drawn that, presuming that the defendant was operating its trains with due care and caution, the plaintiff placed himself in a position that common knowledge would show to be one of danger. We conclude therefore that the petition fails to disclose any facts which constitute negligence on the part of the defendant as a matter of law irrespective of the statute, and does not state a cause of action if based upon a common law liability of the defendant.

The plaintiff contends that the petition states a good cause of action upon three grounds: First, it states a breach of contract to safely convey the plaintiff from the point where he purchased the ticket to the point of destination; second, it states a cause of action under the statute hereinbefore alluded to; third, it states a cause of action on the ground of negligence, by stating facts which as a matter of law constitute negligence on the part of the defendant.

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As to the first contention, we think it clear that this petition is not based upon contract. No promise and no consideration therefor have been alleged. The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove, without alleging that the defendant agreed to carry him between these points in consideration of the sum paid, and alleging further a breach of the contract, does not set forth an action *ex contractu*. 15 Ency. Pl. & Pr., p. 1125, and notes.

"There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. * * * But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in case of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties." *Frink v. Potter*, 17 Ill. 406. See also *Wright v. Geer*, 6 Vt. 151; *Bank of Orange v. Brown*, 3 Wend. (N. Y.) 158; *McCall v. Forsyth*, 4 W. & S. (Pa.) 179.

We conclude therefore that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage.

We have already considered the third ground upon which the plaintiff asserts the petition is sufficient, and decided that his position as to this is unsound. There remains, however, to be considered the contention that the petition states a cause of action under section 3, article I, chapter 72, Compiled Statutes, 1903 (Annotated

Statutes, 10039), and this presents an important point for consideration. Section 3 is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The plaintiff contends that under the allegations of the petition he was a passenger and was injured while being transported over the defendant's railroad, and that since this fact appears upon the face of the petition the liability of the company for damages sustained by him is fixed, unless, by proper pleading and proof as to the plaintiff's criminal negligence or violation of some rule or regulation actually brought to his notice, it relieves itself from the burden and from the conclusive presumption of negligence which is placed upon it by the statute. On the other hand, the defendant insists that a purchaser of a railroad ticket while standing on a station platform waiting for the arrival of a train on which he intends to take passage does not come within the class of passengers protected by the statute, and that such a person is not a "passenger being transported" over the carrier's road. And in this connection the defendant calls attention to the fact that the petition does not allege that the plaintiff was injured while attempting to alight from or board his train, or that he had begun his journey by taking passage on the train. It is obvious therefore that the determination of the question presented rests upon the inquiry whether a person who has bought a ticket and is upon a station platform awaiting the arrival of a train upon which he intends to take passage is a passenger being transported over its road.

Defendant argues that the common law recognized two classes of passengers, those being transported and those not being transported, and established different degrees of care, and in case of injury different rules as to the bur-

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den of proof. That as to the first class the carrier was bound to exercise the highest degree of care which human skill and foresight could devise, and that an injury done to one of this class arising from defective roadbed, equipment or management was presumed to have been caused by the negligence of the carrier. That as to the second class, those not being actually transported, the carrier was only bound to exercise ordinary care, and from an injury to one of this class no presumption of negligence was raised against the carrier.

As to the first proposition there is no difference of opinion worthy of mention. The doctrine that the carrier must exercise the highest degree of care is accepted as the settled rule in nearly all jurisdictions. The reason for this rule is well stated by the supreme court of the United States in an early case, *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) *468, decided in 1852: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" "Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to public safety."

As to the second proposition, however, the authorities are not uniform, one class of cases following the doctrine laid down in 2 Shearman and Redfield, *Law of Negligence* (5th ed.), sec. 501, as follows:

"When Ordinary Care Only Required. The requirement of extraordinary care, being founded upon the special risk of human life involved in the business of carrying passengers, is not to be extended to incidents of the business which do not involve such risk, and in which the carrier stands in the same relation to the passenger as do

other business men from whom such peculiar care is not required. Hence, while a carrier must use ordinary care to make the means of approach and departure and other accessories safe for the use of passengers, he is not required to use any higher degree of care with reference to these things. Therefore, with regard to platforms, stairs, waiting-rooms in a station, the ground surrounding it and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings, inviting persons to enter thereon, for compensation; since passengers are no more endangered, in such places, than they are in similar premises not belonging to a railroad company." *Pennsylvania R. Co. v. Marion*, 104 Ind. 239; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443; *Lafflin v. Buffalo & S. R. Co.*, 106 N. Y. 136; *Fulls v. San Francisco & N. P. R. Co.*, 97 Cal. 114; *Moreland v. Boston & P. R. Co.*, 141 Mass. 31; *Jordan v. New York, N. H. & H. R. Co.*, 165 Mass. 346; *Stokes v. Suffolk & C. R. Co.*, 107 N. Car. 178; *McDonald v. Chicago & N. W. R. Co.*, 26 Ia. 124; *Southern R. Co. v. Reeves*, 116 Ga. 743.

The other class of cases hold in the main that the carrier's duty to a passenger is the exercise of the highest care at all times that the relation subsists, from the time that a person becomes a passenger until he ceases to be such, his journey is completed and he has left the carrier's premises. A few of the cases holding the carrier to the same degree of care with reference to a person who has become a passenger, from the time he assumes such relation until within a reasonable time after his alighting from the train and departure from the platform or station at his destination, are the following: *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667; *Knight v. Portland S. & P. R. Co.*, 56 Me. 234; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.), 227; *Dodge v. Boston & B. Steamship Co.*, 148 Mass. 207; *Weston v. New York Elevated R. Co.*, 73 N. Y. 595; *Norfolk & W. R. Co. v. Galli-*

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her, 89 Va. 639; *Burke v. Chicago & N. W. R. Co.*, 108 Ill. App. 565; *Krantz v. Rio Grande W. R. Co.*, 12 Utah, 104. 30 L. R. A. 297; *Johns v. Charlotte, C. & A. R. Co.*, 39 S. Car. 162, 20 L. R. A. 520.

The question as to which of these two rules governs the liability of railroads for injuries to passengers upon their station platforms or premises in this state, as presented by the pleading in this case, depends upon the proper construction to be given to the phrase, "a passenger while being transported over its road." If the intention of the legislature was that this phrase should be construed literally, then a passenger not actually in process of being moved or carried from one point to another would not be within the protection of the statute. This court, however, has recently had occasion to construe this phrase to some extent. In the case of the *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, 646, this provision is discussed with reference to the facts in that case, where a passenger left the train on his own volition for a purpose not incident to the journey. In that case it is said:

"We are agreed that the words 'while being transported over its road' is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with the plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many—perhaps most—roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes

to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and, while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road: and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose." The phrase then is not in all cases to be literally construed.

If a person who has left the train for any necessary purpose incident to the journey, such as to procure refreshments at a point where the same is furnished by the company, is, while upon the platform on his way to the eating house and during his return to the train, "a passenger being transported" within the contemplation of the statute, is not the intending passenger who has purchased his ticket and who may walk side by side with him upon the station platform on his way to the same coach equally a passenger being transported? He is upon the company's premises furnished to him for the purpose of procuring his ticket and giving him access to the train, and has begun his journey. Should an injury occur to both, can one rule be applied to an action brought by the passenger who was returning from the dining room to the train, and another rule to the passenger who was walking with him from the waiting room or ticket office to the same train? Further than this, how can a reasonable distinction be drawn between the duty of the railroad company to the

passenger sitting in a train about to move from the station, and a passenger upon the platform, or in the station house, ready to take the train and begin his journey?

It is argued in the defendant's brief that the legislature, in adopting the language of the courts when defining the class of passengers entitled to the highest degree of care, adopted the same meaning and construction as was given to that language by those courts. But as we have seen the courts are not uniform in their holdings in this respect, and from the whole course of legislation and judicial construction within this state we believe that the legislature, by the use of the language quoted in the section under consideration, intended no more and no less than that every individual to whom the carrier owed the care due a passenger should, as long as the relation existed, be within its terms, but that when the relation ceases, either by voluntary disregard of reciprocal rights and duties of the passenger as in the *Suttler* case, or by disregard of the reasonable rules and regulations of the carrier on the part of the passenger, or by his criminal negligence, the carrier becomes absolved upon his part from the presumption of negligence created by the statute; or, to place the idea in other words, that from the time the intending passenger places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is "a passenger being transported," unless by some act not attributable to the carrier the relation ceases.

When does the relation of carrier and passenger begin? With but minor differences depending upon the circumstances in each particular case, the courts are generally agreed upon this point. The general rule seems to be that where a person intending to take passage upon a train goes into a station within a reasonable time prior to the hour of departure of the train, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take

passage, from that time on, while waiting for his train, he is entitled to all the rights and privileges of a passenger. In 4 Elliott, Railroads, p. 2459, note 1, it is said the true doctrine is announced by the supreme court of Massachusetts in *Webster v. Fitchburg R. Co.*, 161 Mass. 298. In that case a person who held a ten-trip ticket was struck and killed by a train when he was running rapidly from the direction of the public street across the defendant's premises outside of the passenger station to the track on which was an incoming train, apparently with a view to take another train which was about to start for Boston on the track beyond. It was contended that, inasmuch as he had previously obtained a ticket and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger. The court, however, say:

"One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried, under such circumstances in reference

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to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger."

The rule stated in this case has been approved and cited many times since its announcement, both by text writers and by courts, and we believe the doctrine stated to be sound. If the plaintiff has not brought himself within this rule he was not a passenger, and never became such in the eye of the law, and unless by the allegations of his petition he is within the class his petition will not state a cause of action. It will be observed that the petition contains no allegation in regard to the time when the train upon which he was intending to take passage was due to depart from Norfolk. It alleges the purchase of a ticket, but that alone does not make a person a passenger.

In *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115, 39 L. R. A. 149, it is said:

"One does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier. * * * The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier and is accepted for carriage by virtue of it."

This case is reported in 61 Am. St. Rep. 68, with a monographic note upon the general subject of who are passengers and when they become such.

In *Illinois C. R. Co. v. Laloge*, 113 Ky. 896, 62 L. R. A. 405, the facts were that a passenger went to the railroad station five hours before her train was due, and was assaulted. A statute of Kentucky requires the ticket office and waiting room to be opened, lighted and warmed 30 minutes before train time. The court held that it was the duty of the carrier to provide such facilities for intending passengers within a reasonable time before the departure of its trains. That 30 minutes was a reasonable time, and that, by coming to the station five hours before the schedule time for the departure of the train, the plaintiff did not become a passenger. That there was no obliga-

tion upon the railroad to furnish accommodations for the entertainment for an indefinite length of time of those who contemplate in the future becoming its passengers. That there was no invitation, either express or implied, until within 30 minutes before train time, and that consequently it owed no duty to the plaintiff other or different from that owing to any ordinary person.

In *Phillips v. Southern R. Co.*, 124 N. Car. 123, 45 L. R. A. 163, the circumstances were that a person went to the railroad station five hours before train time. The carrier had a rule to close its waiting room until 30 minutes before the time of departure of each train. The night was cold, the plaintiff was ejected, and was injured by the contraction of a severe cold and subsequent illness. In the opinion the court say:

"A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger it is not necessary that he should have purchased his ticket, as seems to have been considered by his Honor. 1 Fetter, Carriers of Passengers, sec. 288. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still, it is his coming to the station within a reasonable time before, with the *intention* to take the next train, that creates the relation of passenger and carrier."

Another instructive case is *Louisville & N. R. Co. v. Reynolds*, 71 S. W. (Ky.) 516. The plaintiff had gone to the station to take a train at 11 P. M. His train was late, though he testified he did not know this. While he was standing on the platform about 15 feet from the track, he was struck by a piece of coal which fell from a train which was passing rapidly by with loaded coal cars, and was severely injured. The court said:

"Appellee was * * * rightfully on the platform, and sustained the relation of passenger to the appellant for he

was there to take the train, and, the waiting room being closed, had a right to be on the platform. It was train time, and so he had a right to come to the station at this time to take the train; and if it be true that he was told that the train was late, being at the station he had a right to remain there, and wait for it."

With these views we concur.

A railroad company is not bound to furnish a place of entertainment for persons who may intend at some future time to become passengers over its road, and such a person who resorts to its station, or who stands upon its platform exposing himself to such dangers and risks as may naturally and obviously occur at such a place by reason of rapidly moving trains, switching of freight cars, or engines passing by or by the moving of articles of freight assumes and takes upon himself the risk of injury, and is entitled to the carrier's protection in no greater degree than any other licensee. Ordinary care under all the circumstances of the time and place is all he is entitled to. The fact that he may have procured a ticket is immaterial.

The relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train the prospective passenger intends to take, and not until he has in some manner, either expressly or impliedly, placed himself within the carrier's charge. If, within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest degree of care for his safety. To hold otherwise would be to place a most unjust and onerous burden upon the carrier. In this day and age of "limited trains," "lightning expresses," "flyers," "cannon balls," as they are sometimes fancifully designated, many stations and platforms upon main lines of railroads are passed by such trains at rates of speed as high as 60 miles

an hour. If a railroad company were held to the same high degree of care to persons who are not passengers over its road, resorting to its stations to loaf or loiter, it would be compelled to moderate the rate of speed of such trains at every way station along its line, and otherwise would be compelled to interfere with the operation of its trains, and the proper conduct of its business, to preserve the safety and welfare of persons to whom it owed no duty. Such a rule would be intolerable, and has not been enacted by the section under consideration. In order to state a cause of action upon the statutory duty of a railroad company to a passenger, it is necessary that the facts stated show that the person suing is one of a class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient. This rule has been well stated in the case of *Harris v. Stevens*, 31 Vt. 79, where the plaintiff sued in trespass for removal from a railroad station house, and in his replication attempted to establish his right to be and remain at the station. The court sustained a demurrer to the replication, and entered judgment for the defendant. In the syllabus the court say: The right to enter and remain at a railroad station house extends only as far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and as to what is a reasonable time will depend upon the circumstances of each particular case. And in the opinion it is said:

"It is not alleged that it was the intent of the plaintiff to go upon the then next regular train, or that his ticket was for such train. For aught that is alleged his ticket may have been for, and his intent to go upon, one of those trains called excursion trains that are advertised to run at some particular time, and for which tickets are sold many days in advance of the time of departure. In this respect we think the replication is defective; the plaintiff

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should have alleged that at the time, when, etc., he was at the station awaiting the departure of a train that was expected soon to leave, and on which he intended to go. The replication should show that the plaintiff was there intending to go upon a train that was expected to leave within such a short period of time thereafter, that, in view of the rule as before laid down, he would have the right to remain at the station until its departure. This replication, we think, does not show such a state of facts as are necessary to vest such right in the plaintiff, and therefore it is insufficient."

So far then from having brought himself within the class of "a passenger being transported" as the statute prescribes, plaintiff in this case has not even pleaded facts sufficient to show that he was a passenger under the non-statute law prescribing the qualifications of the class of persons embraced under that general designation. For these reasons, we are of the opinion that the petition does not state a cause of action under the statute, and that the demurrer and objections to the introduction of evidence should have been sustained.

A bill of exceptions was settled and allowed in the case, but, since the sole question presented is the sufficiency of the petition, we have not examined the same.

We recommend that the judgment of the district court be reversed and cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed March 8, 1906. *Former opinion modified:*

Carriers: PASSENGERS. Upon reexamination of the question, the sixth paragraph of the syllabus to the former opinion, *ante.* p. 773, is disapproved, and former opinion modified.

LETTON, J.

A rehearing of this case was granted mainly upon the question of whether the proposition laid down in the sixth paragraph of the syllabus of the former opinion, *ante*, p. 773, is a correct statement of the law. This paragraph is as follows: "From the time a passenger, as defined herein, places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is 'a passenger being transported,' unless by some act not attributable to the carrier the relation ceases." No attack has been made upon the principles laid down in the former opinion as to when the relation of carrier and passenger begins, nor is the applicability of the rule questioned requiring the highest degree of care to be exercised by the carrier for the safety of a passenger, but it is earnestly contended that the proposition above quoted was unnecessary to a decision of the case and is unsound as a statement of the law. In *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, it is said:

"We believe and hold that it was intended to include in the words 'while being transported over its road' all passengers actually on the train, whether the same is in motion or standing on any part of the road: and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose."

In our former opinion it was asked whether one rule could be applied to an action brought by a passenger returning from the dining room to the train, and another rule to a passenger walking with him from the waiting room or ticket office to the same train, and it was upon this statement in the *Sattler* case that the proposition herein attacked was founded. After further argument,

and upon more mature consideration, we are convinced that there is merit in plaintiff in error's contention, and that, as said in the *Sattler* case, we must give the qualifying phrase the force intended by the legislature. The difficulty lies in defining and limiting the class of persons who are "passengers while being transported over its road." When does the act of transportation begin and when does it end, and when, if ever, during the journey is the passenger not within the protection of the statute? We have held that this section makes railroad companies insurers of the safety of their passengers. *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb. 689; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803; *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638. Such an onerous burden should not be imposed to a greater extent than warranted by legislative sanction. In its brief, plaintiff in error concedes that the statute should apply to passengers who are getting on or off the platform and steps of the cars, and who are actually riding within the cars, but whether this is a proper limitation or not we are not called upon to determine in this case. It would seem, however, that, after a person becomes a passenger as laid down in the former opinion, the carrier is held to his common law liability alone until the time when the passenger is in the act of journeying, and that from the time that act begins until its termination, and during the necessary incidents of the transportation, he is "being transported." The discussion, in the former opinion and at this time upon this point, is rather academic than necessary to the decision of the case, and it is only for the purpose of avoiding misconceptions in the future that we thought it necessary to reexamine this question. Whether or not a passenger is a passenger "being transported" depends upon the circumstances of each particular case and, until the occasion arises, it is difficult, if not impossible, to draw an exact line between the two classes. Upon the whole, since it is unnecessary in this case to pass upon this question, we think it had better be left an open one for future consider-

ation, when it becomes necessary to the determination of an actual controversy in which discrimination and distinction between the two classes of passengers must of necessity be made. The sixth paragraph of the syllabus is therefore disapproved, and the opinion modified accordingly.

OPINION MODIFIED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V.
ALBERT SEVCEK.*

FILED DECEMBER 7, 1904. No. 13,655.

1. **Railroads: FENCES.** Where a railroad company outside the limits of a city, town or village has established a flag station, with platform, elevator, office and scales, coal house, corn-cribs, etc., for public use, it is not bound, under the provisions of the statute requiring railroads to be fenced, to fence its road in such a manner as to prevent the public from having proper access to its station grounds.
2. ———: ———. The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality.
3. ———: ———. It is the locality where animals pass onto the right of way that determines the liability of the company, as between a place where the statute requires it to fence its road and a locality which it is not required to fence.
4. **Killing Animals: LIABILITY.** Under the facts in this case, held that the railroad company was not excused from fencing its road at the point where the animals went upon the right of way, and that it was liable for the killing of the same.

ERROR to the district court for Howard county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

J. W. Deweese and Frank E. Bishop, for plaintiff in error.

T. T. Bell, contra.

* Rehearing allowed. See opinion, p. 799, *post*.

LETTON, C.

The sole question presented in this case is whether or not the railroad company is liable for the killing of six hogs belonging to defendant in error, which were killed at a point within the station grounds at the station of Warsaw, in Howard county. Warsaw is a flag station on the line of the railroad, there is no town or village at the station, but there is a platform, side track, elevator, office and scales, stock-yards, coal house and corn-cribs. The railroad track runs nearly straight east and west, a side track being on the south side of the main track about 900 feet long. At this point for a distance of about 1,200 feet the right of way is 200 feet wide, on the north side of the track being 50 feet and on the south side 150 feet from the center line of the track. The elevator, stock-yards, corn-crib and coal house are all situated upon the south side of the track, while the platform is upon the north side. There is also upon these grounds a house which is occupied part of the year by a man who attends to buying and shipping grain at the elevator. A public highway runs across the right of way between the stock-yards and the elevator almost at right angles to the track. The evidence shows that Warsaw is a time-card station which has the time for the arrival and departure of trains set down; that no ticket office or waiting room is there, and no tickets are sold at the station, but that tickets are sold from other points to that place. There are usually from 40 to 50 car loads of freight a year, and grain, live stock, emigrant movables, and machinery, baggage and trunks, and people are loaded and unloaded at the platform, stock is shipped and received at the stock-yards, and coal received and sold at the coal house.

Section 1, article I, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10020), requires all railroads to erect and maintain fences on the sides of their railroad sufficient to prevent cattle, horses, sheep and hogs from getting on the railroad, except at the crossings of public

roads and highways, and within the limits of towns, cities and villages, and requires them at all road crossings to maintain cattle-guards sufficient to prevent cattle, horses, sheep and hogs from getting onto such railroad, and makes the railroad corporation liable for damages to stock killed or injured where the fences and guards are not in sufficiently good repair to accomplish the object for which the same are prescribed. If this statute is to be construed literally, the only exception to the requirement of fencing is in public highways, and within the limits of towns, cities and villages; and, since Warsaw is neither a town, city or village, the defendant in error has no defense. Must the statute be strictly and literally construed? This statute has heretofore come before this court for construction with reference to the duty of the railroad company to fence near its switch tracks. In *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, where it was stipulated that the corporate limits of a city, with buildings thereon, extended along one side of the various side tracks of a railway, the land on the other side not being platted; that the side tracks were necessary for the business of the company, and that it would be inconvenient and unsafe to the employees of the company if the cattle guard and fence were erected, it was held that the railway company was not required to fence its tracks at that point. Upon a rehearing the former conclusion was reaffirmed, and the action was reversed and dismissed. 30 Neb. 686.

In *Union P. R. Co. v. Knowlton*, 43 Neb. 751, an animal was killed at a point about midway between the limits of the city of Lincoln and the village of West Lincoln. On the part of the railroad company it was contended that the point was within the actual limits of the Lincoln yard; that the track was in constant use in the making up of trains, and that a fence thereon would be dangerous to employees. The court say:

"It is conclusively shown that the defendant's depot grounds are situated more than a mile distant from the point of the collision. Nor is there in the record any

evidence tending to prove that the use of the track between Lincoln and West Lincoln was necessary in the making up of trains, or that the facilities afforded by the tracks within the yard limits were insufficient for that purpose. The most that can be claimed by the defendant is that it is convenient for it to use the track in question in making up its trains and that it was occasionally used for that purpose. The legislature could not have intended the provision of the exception above noted to include tracks outside of the limits of cities, towns and villages, remote as is this one from the depot grounds and side tracks and not necessary for use in making up trains."

In Minnesota a similar statute made no exceptions as to fencing within cities or villages, and the court held that there was no reason why the requirements of the act should not apply within cities and villages as well as in the country, and that other provisions of the law with reference to obstructing streets and highways would prevent the inclosure of the railroad track at such points. The court further said, however:

"There is another exception implied as to places required to be left open by the public necessity or convenience, such as grounds about stations which are used for the entrance or exit of passengers, or the receipt and delivery of freight; but this public convenience is the limit of the exception." *Greeley v. St. P., M. & M. R. Co.*, 33 Minn. 136, 22 N. W. 179.

The statute is an exercise of the police power of the state enacted for the welfare not of the railroad but of the people. The object of statutes of this nature is primarily the benefit of the public, and secondarily for the benefit of private individuals. In its construction, therefore, courts must give that construction which is most for the public benefit, and must consider in a secondary degree what is the interest of the individual. To enforce the statute accordingly the letter would effectually deprive the public of all the convenience and advantage obtained by the location of a railroad station, grain and coal market,

and stock-yard at that point, and would prohibit every railroad corporation from maintaining transportation facilities for the convenience of farming communities away from the limits of towns, cities or villages. It is not the benefit to the railroad that is to be considered so much as the welfare and convenience of the public. Every railroad company in this state is required by statute to furnish sufficient accommodations for the transportation of passengers and freight, and to take, transport and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their road, on the due payment of fare or freight bill. Under this section the railroad company is compelled to transport passengers to Warsaw upon the due payment of fare, and to furnish them proper facilities for access to or egress from their station platform. It is unreasonable to suppose that the law compels a railroad company to furnish facilities to the public, and at the same time it be compelled by another law to fence the public out from such facilities. This would be manifestly a forced construction of the law. The legislature certainly never intended to prevent a railroad company from furnishing such facilities to rural communities in which no town or village exists, where the demand justifies the giving of the same. As between the right of the public to thus be accommodated, and the danger of the loss to the owner of live stock by the straying of his animals upon the track, the benefit to the public is of more importance, and there is an implied exception to the strict letter of the statute which is dictated by sound reason.

We agree therefore with the contention of the plaintiff in error that a railroad company is not bound to fence its tracks in such a manner as to exclude the public from proper access to its station grounds. The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality. While the railroad company would be ex-

cused from fencing a sufficient portion of its right of way to allow the public access to the loading and unloading facilities there provided, it would not be excused for a failure to fence another or greater space. At the locality in question, however, we see no reason why the railroad company should not have fenced its right of way on the north side to connect with the fence on the west side of the highway, as well as to have fenced it to the highway fence on the east side of the road, as it actually did. It is the locality where animals pass onto the right of way that determines the liability of the company as between a place where the statute requires it to fence its road and a locality which it is not required to fence.

It appears from the plat that both sides of the highway running north from the right of way are fenced, and that the tract of land from whence the hogs went upon the right of way was not open to the public highway. To fence the right of way at this point would in no manner interfere with the access of the public to the transportation facilities afforded by the station. It was private property over which the hogs came, on which the public would be trespassers. Under the circumstances presented by this case the principle invoked by the plaintiff in error does not apply. We cannot speculate upon the proposition as to whether, even if the fence had been along the north side of the right of way, the hogs would have gotten onto the track by traveling east to the line of the highway. The plat in evidence shows a fence along the highway, but whether it is hog tight or not does not appear. There is no evidence to show that they came upon the right of way at the highway, and there is evidence to show that they came upon the right of way at a point where the track might have been fenced without inconvenience to the public or the employees of plaintiff in error. We believe it was the duty of the railroad company under the statute to have a fence at this point, and that they are therefore liable for the actual value of the hogs killed.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed December 7, 1906. *Reversed:*

1. **Railroads: FENCES.** The intent of the statute requiring a railroad company to erect and maintain fences and cattle-guards along its line of road, is to compel the complete inclosure of the track, except in cities, towns, villages and necessary station grounds, so as to prevent access to the same at all points except public crossings.
2. ———: ———. Principles laid down in the first three paragraphs of the syllabus in former opinion, *ante*, p. 793, adhered to.
3. ———: ———. Fourth paragraph of syllabus to former opinion set aside.

LETTON, J.

In the former opinion in this case, *ante*, p. 793, it was held: "Where a railroad company outside of the limits of a city, town or village has established a flag station, with platform, elevator, office and scales, coal house, corn-cribs, etc., for public use, it is not bound, under the provisions of the statute requiring railroads to be fenced, to fence its road in such a manner as to prevent the public from having proper access to its station grounds." It was further held: "The failure to fence is excusable, however, only to an extent sufficient to afford the public and the railroad company necessary facilities for transacting the business reasonably to be expected at this locality." While we still adhere to the doctrines thus laid down, we are convinced that some of the language used in the discussion in the former opinion perhaps conveyed an erroneous impression, and in some respects failed to give due

prominence to the necessity of affording the railroad company proper facilities for the safe transaction of the business reasonably to be expected. If it were necessary for the public convenience and necessary to the proper operation of the railroad, carrying on the business with due regard and care for the safety of employees, that the track should be left unfenced at the point where the hogs came upon the right of way, then the railroad company would not be liable. The safety of the employees of the railroad in carrying on its necessary operations in the vicinity of the station must be considered, as well as the necessity of the public for access to the station grounds. It is contended by the defendant that as a matter of law a railroad company is excused from fencing its station grounds as far as its switching tracks extend in either direction, on account of the danger to employees which would arise from placing cattle-guards at any point where the men would be obliged to walk across them for the necessary operations of switching. It is a matter of common knowledge that, in the present stage of the evolution and development of railroad transportation, it has been thought advisable in many places in the state to construct long switching tracks or passing tracks, extending in many cases far beyond the limits of cities, villages or station grounds, and apparently designed eventually to become parts of a double track system. Carried to its full length, the defendant's contention would excuse a railroad company from failing to fence as far as these tracks extend, even though only used occasionally; but this, we think, would be giving an improper construction to the statute. *Russell v. Hannibal & St. J. R. Co.*, 26 Mo. App. 368; *Chouteau v. Hannibal & St. J. R. Co.*, 28 Mo. App. 556. Under the statute the company must fence outside of the limits of cities and villages, except where excused by surrounding circumstances. If it plainly appear from the evidence that the locality is one where the proper conduct of the business, considering both public convenience and the operation of the railroad with regard to the safety of em-

ployees, requires that it be left unfenced, then the court may so declare; but where the question is one of doubt it is for the jury. *Cole v. Duluth, S. S. & A. R. Co.*, 104 Wis. 460, 80 N. W. 736. A point at which the company maintains merely a platform and a switch which is only used a few times each year cannot, in reason, be treated the same as another where a station is maintained, and where elevators, scales and corn-cribs for public convenience are found, and where freight is loaded and unloaded frequently. The fact that at a given point cars are occasionally loaded and unloaded and switched would not alone excuse a railroad company from fencing at that point; but, if the evidence showed that the public convenience and the reasonably safe operation of the defendant's business would be unduly hindered and interfered with by the inclosure of the tracks, then it would be excused from fencing. If the evidence should show that danger to employees was but little to be apprehended at a given point with the exercise of proper care and caution upon their part, then the fact that that point was used occasionally to receive and discharge freight or passengers would not excuse the company from fencing, except to the extent that the public convenience required it, and if the public could be served by inclosing all but a small portion of the track, then so far only would the company be excused. *Toledo, St. L. & K. C. R. Co. v. Franklin*, 159 Ill. 99; *Toledo, St. L. & K. C. R. Co. v. Cupp*, 9 Ind. App. 244; *Railroad Co. v. Neubrander*, 40 Ohio St. 15.

The statute requires the railroad company to erect and maintain fences on the sides of the railroad "suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad," except at the crossings of public roads and highways, and within the limits of towns, cities and villages, and to construct and maintain at all road crossings cattle-guards suitable and sufficient for the same purpose. The intention of the statute seems to be to require the complete inclosure of the railroad track by means of fences and cattle-guards, so as to prevent

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access to the tracks at all points except at public crossings. The defendant's answer presents the issue that the locality was a part of its depot grounds, and that public necessity and proper regard for the safe operation of its business required that it be left unfenced. This issue was submitted to the jury by an instruction based upon this allegation in the answer. The amount of switching done at this point was shown to be very small, and the evidence as to the danger to employees if the railroad had been fenced is very meager and unsatisfactory. The only witness as to this was the section foreman at that point, and we are convinced that, upon the issue as to whether the safety of its employees required the locality to be unfenced, the defendant failed to establish its defense, and the jury were warranted in finding against it upon that issue.

There remains then the question whether the public convenience excused the railroad company from inclosing its tracks at the point where the hogs came upon the right of way. They were killed close to the elevator on the south side of the track, and apparently had passed from the rye field directly north across the tracks to the vicinity of the elevator. If, as we now hold, the statute requires the complete inclosure of the track with fences and cattle-guards at points where the company is required to fence, then an inclosure of that portion of the grounds would exclude the public from the shipping and receiving facilities afforded by the elevator, coal house and corn-cribs, and thus largely deprive it of the benefits afforded by the railway station. This the company is not compelled to do, and hence was excused from inclosing its tracks at that point. The doctrine of the former opinion is sound in the main, but it failed to give due weight to the necessity of complete inclosure by fences and cattle-guards at points where a railroad company is required to fence. The conclusion reached and the fourth paragraph of the syllabus to the former opinion are therefore set aside, and the judgment of the district court is

REVERSED.

SEDGWICK, C. J., concurring.

Railroad companies are not required to fence their station grounds, if free access to the grounds by the public is necessary for the public convenience in transacting business with the road. When, for the convenience of the public, free access to the station grounds is necessary, the railroad company is not required to fence any part of such grounds, so as to exclude the public from access thereto at any point. If domestic animals running at large go upon such station grounds, and as a result of such trespass are injured by the ordinary operation of the road, the company is not liable for damages so occasioned. The company cannot extend such station grounds beyond reasonable requirements for the convenience of the public and the safety of the employees of the company. It must fence its right of way so far as it can do so without unreasonably limiting the area and extent of its station grounds. In this case the animals in question were trespassing upon the station grounds of the company, and while so trespassing were injured by the ordinary operation of the company's trains. The defendant therefore is not liable. The fact that the animals before going upon the station grounds may have crossed the right of way at a point where the same should have been fenced is immaterial.

For these reasons, I concur in the conclusion reached.

R. H. BENTLEY V. ESTATE OF MARY A. BENTLEY.

FILED DECEMBER 7, 1904. No. 13,656.

1. **Deposition: Cross-Examination: Witness: Competency.** Where the testimony of a person having a direct legal interest in the result of an action where the adverse party is a representative of a deceased person is taken by deposition, and his testimony as to transactions with the deceased is objected to upon that ground, the adverse party may cross-examine. By so doing he does not waive his objections to the competency of the witness, but may urge the same at the trial. If the evidence in chief is admitted at the trial the cross-examination should also be

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admitted; but, if the evidence in chief is excluded upon the objections of defendant as to competency, the cross-examination should also be excluded upon the defendant's objection, and the plaintiff is not entitled to use it to establish his case.

2. **Married Woman: ACTION: EVIDENCE.** In an action on account against a married woman, where the defendant pleads coverture, and the plaintiff in making his case discloses such fact to exist, he must prove, in order to recover, that the transaction upon which his action is based was had with reference to or with intent to bind her separate property, estate or business.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Talbot & Allen, for plaintiff in error.

Stewart & Munger, contra.

LETTON, C.

This is an error proceeding from the district court for Lancaster county disallowing plaintiff in error's claim against the estate of Mary A. Bentley, deceased. The claim was disallowed in the probate court, and upon appeal to the district court it was tried without a jury, and the plaintiff in error's cause of action dismissed. Mary A. Bentley died in May, 1901. In November, 1901, R. H. Bentley, plaintiff in error, filed a claim against her estate for \$220 and interest. To establish the claim his deposition was taken before a notary public. Objection was made to his testimony upon direct examination on the ground that he was incompetent under section 329 of the code, the adverse party being the representative of a deceased person. At the conclusion of the direct examination, counsel for the defendant cross-examined the witness. Plaintiff in error contends that, though the court probably disregarded the testimony given by the plaintiff upon his direct examination, still it had no right to disregard his testimony given upon cross-examination, for the reason that by cross-examining the witness the defendant waived objections to the incompetency of the witness by reason

of his having a direct legal interest in the result of the controversy. At the trial the testimony given by the plaintiff in his examination in chief was admitted by the court over the objection of the defendant. The defendant objected to the admission of the cross-examination for the same reasons, the objection was overruled and the testimony admitted.

The claim consisted of a number of separate items of account, and there is no evidence except that of the plaintiff to show that these items were ever received and promised to be paid for by deceased. This court has repeatedly held that, upon the trial of an action at law to a court without the intervention of a jury, the court will be presumed to have considered only competent evidence, and that, if there is sufficient competent evidence to sustain the finding, it will not be disturbed. The district court evidently having this rule in mind overruled all objections, heard the testimony, and then disregarded all that was incompetent and all to which the witness was incompetent to testify. It is obvious that the plaintiff was entirely disqualified to testify with regard to his transaction with the deceased, and that all of his evidence as to this was clearly incompetent. The trial court would have erred if it had considered any of it, and it was rightly disregarded.

The argument of plaintiff in error that the defendant, by cross-examining the plaintiff, waived the objections to his incompetency, while perhaps available under certain circumstances in a case where the witness testified in open court, and the objections to his testimony in chief were ruled upon by a court having power to exclude or admit the same—which we do not decide—is not applicable where the testimony is taken by deposition, for the reason that the notary has no power to exclude testimony, but must receive all that is offered, noting the objections and exceptions of the parties, to be ruled upon at the trial. The only safe manner in which a defendant can proceed in such a case is to make his objection to each question on

the direct examination, and to cross-examine upon the theory that the direct examination may be admitted by the trial court. If the direct examination, however, is excluded at the trial upon his objections upon the ground that the witness is incompetent, the cross-examination falls with it for the same reason, if objected to, and the plaintiff is not entitled to use it independently. A different rule would be decidedly unfair, since a party might fail to cross-examine because he believed the trial court would exclude the examination in chief, while, if the trial court admitted it in evidence, he would be deprived of the benefit of cross-examination entirely. *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45.

The defendant pleaded the coverture of Mary A. Bentley. The fact that she was a married woman at the time of the transaction was disclosed by the plaintiff, and no proof was made that the transaction was made with reference to her separate property, estate or business. This omission in itself was fatal to a recovery.

Considering only the competent evidence, there is not sufficient upon which to base a finding in favor of the plaintiff, and the judgment of the district court was the only one that could rightfully be rendered.

We recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES B. WILSON V. ULYSSES TOWNSHIP OF BUTLER
COUNTY, NEBRASKA.

FILED DECEMBER 7, 1904. No. 13,661.

1. **Highways: Townships: Liability.** A township organized under the township organization act in this state is not liable to persons injured by reason of defects in the public highways within the limits of such township.
2. **Case Distinguished.** The second point in syllabus in the case of *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258, distinguished, in so far as it states unqualifiedly that such township is a "municipal corporation."

ERROR to the district court for Butler county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

C. H. Aldrich and L. B. Fuller, for plaintiff in error.

Matt Miller, contra.

LETTON, C.

This action was brought against Ulysses township of Butler county, Nebraska, to recover damages for injuries sustained by the plaintiff in error, by reason of the defective condition of a highway within said township, which it is alleged it was the duty of the township as a municipal corporation to keep in repair. A general demurrer to the petition was sustained and the action dismissed. The question presented is whether or not a township in counties in this state under township organization is liable for injuries caused by defects in the public highways within such township.

The plaintiff in error bases his right to recover substantially upon three grounds: (1) That a township under the township organization act of 1895 is a complete corporate entity with plenary powers with respect to all of its duties and obligations; (2) that such a township

assents and voluntarily agrees to relieve and take upon itself certain duties and liabilities imposed by statute on counties; (3) that the liability with respect to special damages imposed upon counties is now transferred by virtue of the township organization act to the respective townships adopting the same. He contends that a township in this state is a complete municipal corporation; that, having voluntarily entered into certain obligations, having a charter for its existence in the constitution itself, and being by statute clothed with full authority to maintain a government for and by itself, in the same way and to the same extent as a village, the liability for negligence must follow; that there is a clear distinction between counties under the commissioner system and townships under the township system; that a county is a subdivision of the state itself, but that a township is a full and complete municipal corporation, having an independent corporate entity and a complete scheme of government, invested with exclusive control over the highways within its limits, and with authority to raise money and repair the same, and that hence at common law it is liable for failure to perform its duties, and for damages to individuals injured by such failure.

If, as is contended by the plaintiff, a township under our township organization act is a complete municipal corporation, and is to be considered in all respects the same as the ordinary municipal corporation, which usually consists of a town, village or city in the concrete sense of an aggregation of dwellings, or of persons living in more or less close proximity within a circumscribed area, the mere statement of the proposition would be the only thing necessary to establish the liability of the defendant in error. Ever since the opinion of Judge MAXWELL in *City of Omaha v. Olmstead*, 5 Neb. 446, it has been the settled law in this state that municipal corporations are liable for the failure upon the part of their officers to perform their duty in regard to maintaining the streets of the city in a reasonably safe condition. In that

case the leading English and American cases upon the subject were cited in the argument and in the opinion, and the doctrine laid down therein is in conformity with the holding of the great majority of the courts of this country.

Is a township a municipal corporation such as to make it liable for the negligence of its officers as to highways under the rule adopted in the state? The origin of the township in this country as a governmental unit, is to be found in the New England colonies. The statutory provisions in Massachusetts with respect to the powers, duties and liabilities of towns may be taken as typical of those usually enacted for the creation and government of such corporations. By the laws of Massachusetts townships are bodies corporate. They may in their corporate capacity sue and be sued in the name of the town. They may hold real and personal property for the use of the people of the town, and may hold property in trust for the support of schools. They may make all contracts necessary for the exercise of their corporate powers, and may sell and dispose of their corporate property. They may levy taxes for the support of schools, for the relief of the poor, for the construction and repair of highways, and for burial grounds, and may make by-laws for their general management and for preserving peace and good order. Town meetings are provided for at which town officers shall be elected, and the respective duties of these officers are specified in detail. The idea of the New England town was carried westward with the spread of population, and in nearly every western state the New England town meeting exists, either by itself as the only agency for general local administration outside of unincorporated villages and cities, or side by side with the system of county government by commissioners, which system has also spread westward from those colonies in which it first evolved upon this side of the Atlantic. For an interesting and instructive account of the history, modifications and practical operation of the township and county sys-

tems of local government in this country, see Bryce, American Commonwealth, chapter 48.

At a very early period in Massachusetts it was thought necessary to provide by statute that towns should be liable to actions for defects in the highways by persons who sustained special damage to their persons or their property by reason of such defects, and generally in the New England states to this day such liability is compelled by statute, so that but little light upon the question under consideration is to be found in these states, unless from the fact that, since statutes were enacted imposing such liability, the presumption may perhaps arise that, in the absence of such statute, no such liability was thought to accrue. In *Mower v. Leicester*, 9 Mass. 247, decided in 1812, it was held that a town was not liable in a common law action for damages sustained by an individual from a defect in the highways of the town. This case was based upon the doctrine of the English courts; the case of *Russell v. Men of the County of Devon*, 2 T. R. (Eng.) 667, being the leading case upon the subject. An interesting discussion of this subject is to be found in 1 Dillon, Municipal Corporations (4th ed.), secs. 961, 962, 963. A most thorough and exhaustive consideration of the whole subject, with the history of the various adjudications both in England and in this country, and a critical examination of nearly every case, is to be found in the learned opinion of Chief Justice Gray in *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332. Nothing that this court can say can equal this illuminating opinion in the light thrown upon the whole question. See also for the opinion of this court upon related subjects, *McConnell v. Dewey*, 5 Neb. 385, and *City of Omaha v. Olmstead*, *supra*.

Upon a comparison it will be seen that there is but little difference between the powers, duties and liabilities of a county in this state and those of a township. The object and purpose of their organization are the same, and the results sought to be accomplished are substantially alike,

except in degree and territorial extent of jurisdiction. The main point of distinction between the two systems is the more popular and democratic form of government allowed by the township; the idea of local self-government being the essence of the township system. *Van Horn v. State*, 46 Neb. 62. Counties are bodies politic and corporate. They may sue and be sued, plead and may be impleaded, and defend and be defended against, in courts having jurisdiction of the subject matter. They have power to purchase and hold the real and personal estate necessary for the use of the county, and may be the beneficiary of real estate conveyed to trustees, whether the real estate is situated in the same county or other counties of the state. They may sell, convey or lease any real or personal estate owned by the county. They may make contracts and do all other acts necessary to the exercise of their corporate powers. They may lay out, alter or discontinue roads, provide the necessary buildings, furniture and stationery for the use of the county officers. Townships also are bodies corporate. The law provides that each town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others. It shall have power, first, to sue and be sued; second, to acquire property both real and personal for the use of its inhabitants, and to sell and convey the same, and to make such contracts as may be necessary in the exercise of the powers of the town; and the electors at the town meeting shall have power, among other things, to foster the planting of trees along the highways in such towns; to provide for public wells and regulate their use; to prevent nuisances; to make by-laws, to carry the powers of the township into effect; to raise money for constructing and repairing roads and bridges, for the prosecution or defense of suits by or against the town; and, in general have substantially the same powers for the same purposes as are authorized on the part of the county. A critical survey of these statutory powers granted to counties as corporate entities, and to townships as such, shows

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clearly that the purpose of the township, as of the county, is to carry into effect with ease and facility certain powers and functions which are governmental in their nature, and which may be more readily and conveniently carried on by subdivision of the territory of the state into smaller areas. The powers with which they are entrusted are powers segregated and carved out from the mass of the sovereignty of the state. They are subdivisions of the state government upon which, for convenience, certain powers have been conferred, strictly limited, however, to the exercise of certain functions more easily carried out by subdivision.

A township partakes somewhat of a dual nature. In so far as its inhabitants exert the power of direct local self-government, they resemble municipal corporations acting under charters conferring such powers, but, in so far as the powers which the township exercises are limited and confined to those which properly belong to the government of the state as a whole, and which are merely devolved upon the township as a portion of the state government, they are mere local subdivisions of the state. Such organizations therefore are merely *quasi* corporations, not endowed with the full and plenary powers usually conferred either by charter or by general law upon municipal corporations proper, but only resembling the same in organization and functions. The assent of the inhabitants of each township to the provisions of the law is not required before the duties and liabilities imposed by the act are put in operation. It is a majority of the voters in the county which prescribes whether the township organization act shall apply within a given county or not. The inhabitants of a given township may be bitterly opposed to the township system of government, but they may be compelled against their will to be governed by this system.

"The reason which exempts these public bodies from liability to private actions, based upon neglect to perform a public duty, does not apply to villages, boroughs and cities, which accept special charters from the state. The

grant of the corporate franchise in those cases is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege, and which is held to be a consideration for the duties imposed by the charter. By those charters, larger powers of self-government are conferred than those confided to towns or counties; larger privileges in the acquisition and control of corporate property, and special authority is given them to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. These grants raise an implied promise on the part of the corporation to perform their corporate duties, and it inures to the benefit of every individual interested in its performance." *Town of Waltham v. Kamper*, 55 Ill. 346, 8 Am. Rep. 652.

Say the supreme court of the United States:

"And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, *Municipal Corporations* (4th ed.), secs. 10, 11, 13; 2 Dillon, *Municipal Corporations* (4th ed.), sec. *761. The latter are auxiliaries to the state merely, and, when corporations, are of the very lowest grade, and invested with the smallest amount of power." *Barnes v. District of Columbia*, 91 U. S. 540.

In *Riddle v. Proprietors of Locks and Canals on Merrimack River*, 7 Mass. 169, it was said by Chief Justice Parsons:

"We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds, in

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England; and counties, towns, etc., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of public duty imposed on them by law, yet it is settled, in the case of *Russell v. Men of the County of Devon*, 2 T. R. (Eng.) 667, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute."

The statement in the second part of the syllabus in *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258, that "a township in a county under township organization is an independent corporate entity—a municipal corporation—within the meaning of section 6, article IX of the constitution," is to be considered with reference to the matter actually in controversy in that case. In the body of the opinion it is said:

"In other words, a township in counties under township organization is an independent corporate entity, authorized by the constitution and vested by the legislature with power to assess taxes upon all the property therein for such purpose as the legislature has declared to be township purposes."

The question as to whether a township was a "municipal corporation" was not at issue in the case and was not considered. It is not stated in the body of the opinion that a township is a municipal corporation, and the clause injected in the syllabus was evidently done by inadvertence and is merely *obiter dictum*.

In this state the rule of the common law has been adopted, and counties being only *quasi* corporations are held not liable to parties injured by defects in highways. *Woods v. Colfax County*, 10 Neb. 552. By the enactment of the law of 1889, sections 114-118, chapter 78, Compiled Statutes, 1903 (Annotated Statutes, 6132-6136), which provides that, under certain circumstances and for a limited period after the injury is sustained, an action may be maintained against the county for such injury, the rule has been changed to a limited degree only, and, unless a party injured brings himself strictly within the letter

of the statute, the common law rule still applies. *Sweeney v. Gage County*, 64 Neb. 627. The rule of the common law applies as well to townships; and there being no statute imposing such liability upon them this action cannot be maintained. We are aware that in a few states a different rule is applied as to the negligence of such *quasi* corporations, but we believe the one announced to be based upon the better reason and more in accord with the previous decisions of this court. If another rule is to be adopted in this state it must be done by legislation.

2. We think there is no force in the contention of the plaintiff in error that after the enactment of the township organization law the special statute just mentioned, which is applicable by its terms to counties only, became applicable to townships.

We recommend that the judgment of the district court be affirmed.

AMES and OLDSHAM, CC., concur.

By the Court: For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

LOUIS F. WOODRUFF V. STATE OF NEBRASKA.

FILED DECEMBER 21, 1904. No. 13,659.

1. **Criminal Law: LEADING QUESTIONS.** A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations.
- 1a. ———: ———. *Held*, in the case at bar, that no error was committed in allowing questions of a leading character to be asked, of which complaint is made.
2. **Rape: EVIDENCE.** In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent

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acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established.

- 2a. ———: ———. In proving the commission of the offense charged in such a case, it is not error to permit the prosecutrix to testify that, at the time of the commission of the offense, the accused promised to marry her if any trouble arose, even though such evidence may tend to prove the crime of seduction.
3. Evidence in such a case tending to prove that the prosecutrix became pregnant, and that a child was born as a result of the alleged illicit intercourse, is properly admissible.
4. Conduct of Accused. Any attempt to suppress evidence to stifle the prosecution and prevent a trial by flight beyond the jurisdiction of the court are circumstances from which unfavorable inferences may be drawn against the defendant in a criminal case. *Hubbard v. State*, 65 Neb. 805.
5. ———. In a prosecution for rape upon a female person under the age of consent, an attempt by the accused to have an abortion committed upon the prosecutrix is an inculpatory circumstance properly admissible in evidence and to be considered by the jury in determining the guilt of the accused of the offense charged.
6. Evidence. In a prosecution for carnally knowing and abusing a female child under the age of consent, where the previous chastity of the prosecutrix is in issue, it is not error to permit evidence tending to prove that, at the time of the commission of the offense, the prosecutrix was not aware that the accused was a married man.
- 6a. ———. Where the evidence on the part of the defense indisputably establishes the fact that, at the time of the commission of the alleged offense, the accused was a married man, evidence on the part of the prosecution tending to prove the same fact could, at most, be error without prejudice.
7. Errors Reviewed. Other alleged errors as to the admission and rejection of evidence examined, and held to be without merit.
8. Trial: CROSS-EXAMINATION. No error is found in the request of the court to counsel to desist from the further cross-examination of a witness along lines held by the court to be improper, nor in the manner of making the request.
9. Previous Chastity: EVIDENCE. In the prosecution of one charged with rape upon a female child under the age of consent where the issue of the previous chastity of the prosecutrix is involved, evidence of the general repute of the prosecutrix is not admissible

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- to prove prior unchastity. In such a case, chastity, as that term is used in the statute, means the character in reality for virtue possessed by the prosecutrix as distinguished from what it is reputed to be.
10. ———: ———. To prove the previous unchastity of a prosecutrix in a charge of statutory rape, it is not permissible to put in evidence the general reputation of one with whom she has associated, as to the latter being a person of unchaste character.
 11. Evidence: REVIEW. The admission of evidence tending to prove that a third party, with whom the prosecutrix was alleged to have had illicit intercourse before the commission of the offense charged, was at the time of the trial out of the state and beyond the jurisdiction of the court, *held* not prejudicially erroneous.
 12. Testimony in rebuttal, *held* properly admissible.
 13. Instruction: REVIEW. An instruction limiting the evidence of subsequent acts of illicit intercourse to the sole purpose of corroborative evidence, *held* properly given.
 14. ———: ———. The same rule applied to an instruction regarding evidence tending to prove that the accused endeavored to have an abortion committed upon the prosecutrix.
 15. Evidence examined and found to be sufficient to sustain the verdict of guilty returned by the jury.

ERROR to the district court for York county: BENJAMIN F. GOOD, JUDGE. *Affirmed*.

France & France, for plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown* and *Meeker & Wray*, *contra*.

HOLCOMB, C. J.

On a trial to the court and a jury upon an information filed by the county attorney, the defendant was by the verdict of the jury found guilty of the crime charged; and, after the overruling of a motion for a new trial, he was by the court sentenced to imprisonment in the penitentiary for a period of four years. To secure a reversal of the judgment thus imposed, the defendant has prosecuted proceedings in error in this court. The charging part of the

information is that "said Louis F. Woodruff being then and there a male person over the age of 18 years, in and upon one Mabel Kerwood, a female child under the age of 18 years, to wit, between 15 and 16 years of age, and not previously unchaste, then and there being, feloniously did make and assault, and her, the said Mabel Kerwood, then and there wickedly, unlawfully and feloniously did carnally know and abuse. She, the said Mabel Kerwood, being then and there a female child between 15 and 16 years of age, as aforesaid, and not previously unchaste." Section 12 of the criminal code declares: "If any male person, of the age of 18 years or upwards, shall carnally know or abuse any female child under the age of 18 years, with her consent, unless such female child so known and abused is over 15 years of age and previously unchaste, every such person so offending shall be deemed guilty of a rape." The gravamen of the offense charged under the section defining the crime is the unlawful sexual intercourse by a male person over 18 years of age with a female child under the age of consent. In the case at bar, the prosecutrix being over 15 years of age, her alleged previous chastity was put in issue, and evidence was introduced for the purpose of showing she was previously unchaste, and as a complete defense to the crime charged. With these preliminary observations we proceed to a consideration of the more important of the alleged errors which are assigned and argued as grounds for a reversal of the judgment of conviction. The errors complained of are confined almost wholly to the rulings of the trial court on the admission and rejection of evidence and its instructions to the jury.

1. It is assigned as error that defendant's substantial rights were prejudiced because of the many leading questions permitted to be propounded to the prosecutrix over objections, and by that means eliciting answers favorable to the prosecution in support of the charge preferred. We find upon examining the record that many of the questions complained of as leading do not in fact suggest or lead to

the answer desired. While they may be answered by yes or no, they are not necessarily for that reason to be regarded as leading. Some are preliminary in their nature and as such, even though leading, are permissible. Others, after the prosecutrix had narrated all the facts in response to questions leading up to and including the commission of the crime charged, to the form of which we see no valid objections, were for the purpose of furnishing technical proof of the alleged unlawful act. Some of these questions which were permitted to be asked and answered may have been, and probably were, in a measure, of a leading character, but regarding which we are satisfied no abuse of discretion was committed by the trial court in suffering the examination to be pursued in the manner in which it was. It is, say all the authorities, discretionary with the trial court in both civil and criminal cases to allow leading questions on the direct examination; the discretion, of course, being a legal one and subject to proper limitations. Stephen, Digest of the Law of Evidence, 445, and note; McKelvey, Evidence, sec. 237, and notes. In *Edwards v. State*, 69 Neb. 386, it is held that the trial court has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. In support of the rule there is cited in the opinion, *Schmelling v. State*, 57 Neb. 562, and *Welsh v. State*, 60 Neb. 101. We are satisfied that no serious error was committed by the trial court in respect of the matter complained of.

2. It is next contended that error prejudicial to the defendant was committed in permitting the prosecutrix to testify as she did to subsequent acts of illicit intercourse, which occurred at frequent intervals soon after the commission of the crime charged in the information. As we have noted, the essence of the offense is the unlawful sexual intercourse. The reason for the rule which should govern in respect to the admissibility of evidence to prove the charge ought not, it would seem, to be essentially different from evidence admissible to prove the crime of

adultery or seduction. In the case of *Way v. State*, 5 Neb. 283, it is held that, on a charge of adultery, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. In the opinion it is said:

"There is no doubt of the conflict of authorities upon the question, but upon an examination of it, we are of the opinion that the better rule in prosecutions for adultery is, to admit testimony of improper familiarities between the parties, occurring both before and after the time the act is charged, as corroborating evidence." Citing with approval, *Thayer v. Thayer*, 101 Mass. 111.

This rule has been held applicable to cases such as the one under consideration, in California, Iowa, Kansas, Kentucky, North Carolina, Tennessee, Washington and Wisconsin.

In *State v. King*, 117 Ia. 484, 91 N. W. 768, it is said:

"It may be, as contended by appellant, that in most of the cases the proof related to acts preceding the particular offense charged, but in view of the purpose of such testimony to show the relationship and familiarity of the parties, and to corroborate the prosecutrix, we discover no good reason why evidence of acts subsequent to that charged, if in some way connected with it, may not have as direct a bearing on those occurring before. The weight of authority authorizes similar proof in cases wherein adultery is charged, and, as evidence of other acts is received on precisely the same principle in causes of this character, there is no apparent ground for rejecting such evidence in the one class and receiving it in the other. The disposition toward each other might be quite as potential between parties when the female, though under 15 years of age, voluntarily yields her consent to the intercourse, as in the case of adultery; and we think evidence of repetition of the act so soon after the first offense rightfully admitted. Had the intercourse been against her consent, a different question would arise."

In *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810, the court say:

"In principle there is no distinction, in this respect, between a prosecution where the charge is incest and a prosecution where the charge is rape upon a female child under the age of consent. The same reason that renders the testimony admissible in the one case renders it admissible in the other, and such is the effect of the authorities."

The Wisconsin supreme court say:

"Evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy. Under this rule, in prosecutions for adultery, other adulterous acts between the parties than the one for which the accused is on trial, may properly be given in evidence upon the ground that they tend to corroborate the evidence as to the particular act of adultery charged. In this case (statutory rape) it cannot be doubted that the evidence, as regards other acts of intercourse between the accused and the girl, tended to corroborate her evidence as to the particular act alleged, the same as in a case of adulterous intercourse." *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128. See, also, *People v. Edwards*, 73 Pac. (Cal.) 416; *State v. Robertson*, 121 N. Car. 551, 28 S. E. 59; *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. 531; *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185; and *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108.

We are satisfied that consistency and sound reason require the extension of the rule announced in *Way v. State*, *supra*, to a case like the one under consideration, and that the greater weight of authority, as well as the better reasoning, supports the rule. The fact, if it be one, that the evidence tends to prove another and independent crime does not necessarily determine its admissibility as evidence of the crime charged in the case at bar. The determinative question is, is it relevant and pertinent in establishing the offense charged, and does it throw some

light on that controversy and assist in the ascertainment of the truth in respect of such charge? We feel confident in the correctness of our position in saying that it does; and, if believed, the evidence is corroborative of the ultimate fact sought to be proved; that is, the act of sexual intercourse as charged in the information. It is also in this connection contended that the court erred in permitting the prosecutrix to testify that at the time of the commission of the alleged offense, and immediately before the act of sexual intercourse, the accused said he would marry the prosecutrix if he got her into any trouble. We see no error in the admission of this evidence. It was a part of the principal transaction—a part of the *res gestæ*. It was proper to show what induced the prosecutrix to submit herself to the embraces of the accused, whether this inducement was a promise to marry her and thus shield her from the consequences of wrongdoing, or was any other inducement or artifice resorted to in order to gain her consent. The fact that it may have tended to prove seduction is no objection to its admissibility. It is admissible in spite of such fact, and as a proper element of proof in support of the charge preferred against the accused. It is no objection to say the accused possibly, under other conditions and different circumstances, would be guilty of the commission of another crime than the one for which the prosecution was had. *Chapman v. State*, 61 Neb. 888.

3. An objection is offered because the trial court permitted the prosecutrix to testify that she became pregnant, and that a child was born as the result of the alleged illicit intercourse. Evidence of this character is proper and admissible. It indisputably established one element necessary to be proved by the state, that is, that sexual intercourse had taken place. It was proof of the *corpus* of the crime, as it were; that is, that the prosecutrix had sustained unlawful relations with some one was by this evidence placed beyond the pale of doubt. It is admissible on the same principle that an expert would be permitted to testify, after examination, that the girl had surren-

dered to some one her virginity. By this evidence the controversy was narrowed to the question of the defendant's relation to this positive evidence that a crime had been committed. The time during gestation, and of the birth of the child, was consistent with the theory of the prosecution as to the time of the commission of the act charged. The child was the legitimate fruit of the illicit sexual intercourse. In bastardy cases such facts are always admissible in evidence. *McNeal v. Hunter*, ante, p. 579, And the same rule is applicable to cases of seduction, which in principle is in many respects analogous to the crime of unlawful sexual intercourse with a female under the age of consent. In *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810, it is held that, in a prosecution for rape on a female under the age of consent, testimony of a physician that prosecutrix, subsequently to the alleged rape, but within the period of gestation, had suffered a miscarriage, was competent both as evidence of the crime, and in corroboration of the prosecutrix's testimony that defendant was the guilty party. The admissibility of such evidence is recognized in *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128, and *Knowles v. State*, 44 Tex. Cr. App. 322, 72 S. W. 398, on rehearing; although the latter case is cited as authority by counsel for plaintiff in error in support of his contention that such evidence was erroneously admitted.

4. The prosecutrix was permitted to testify as to statements in the nature of admission made by the accused with reference to attempts made by him to elude the officers of the law after he had learned that criminal proceedings were about to be instituted—such as leaving the state and going by an assumed name—and also attempts made by him to have the prosecutrix absent herself from court at times when the case was expected to be taken up for trial. Proof of all these facts and circumstances was clearly admissible as being inculpatory, and as having a tendency to fasten upon defendant guilt of the crime of which he was charged. The tendency of all such evidence and the inference proper to be drawn, if believed, were in-

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consistent with the innocence of the accused, and had a legitimate bearing upon the question of fact put directly in issue by his plea of not guilty.

"An attempt to suppress evidence, to stifle the prosecution, and to prevent a trial by flight beyond the jurisdiction, are circumstances from which unfavorable inferences may be drawn against the defendant in a criminal case." So say this court in *Hubbard v. State*, 65 Neb. 805. See, also, *George v. State*, 61 Neb. 669; *Richards v. State*, 65 Neb. 808, and *Blair v. State*, 72 Neb. 501. The rules announced in these several authorities are quite applicable here and render all of the evidence of the nature referred to properly admissible.

5. Complaint is also made because the court admitted evidence tending to prove that when the prosecutrix became pregnant the defendant endeavored to have an abortion upon her committed. This evidence, if believed, shows a consciousness of guilt on the part of defendant and, upon principles above alluded to, is properly admissible. The fact that it tends to prove another independent crime does not for that reason alone render it incompetent. Its tendency is not only to corroborate the prosecutrix as to the principal fact alleged, but it is also in the nature of a tacit admission by the accused that he is responsible for her unhappy condition. It is an inculpatory circumstance proper to be considered by the jury in arriving at its verdict. We find no error in its admission.

6. Because the prosecutrix was permitted to testify that she was not aware the accused was a married man until after the time of the alleged offense, error is sought to be predicated on the admission of such evidence. We perceive no error in its admission. It is true that question does not affect the guilt or innocence of the accused, but the relations between the prosecutrix and the accused were a material subject of inquiry. The question of her chastity was involved in the issues raised in the case. Whether she was receiving the attentions and embraces of

an unmarried man who she might reasonably expect would shield her from the consequences of their illicit intercourse, or of a married man from whom no such protection could be expected, was a circumstance proper to be considered, and, for such reason, the evidence was not erroneously admitted. It is quite probable that the jury would have felt less confident of the previous chastity of the prosecutrix had they believed she yielded to the accused, knowing he was a married man, than would have been the case if she believed him unmarried. Again, by the accused's own testimony it became an established and indisputable fact that he was a married man at the time of the commission of the alleged offense, so that the admission of any evidence by the prosecution establishing the same fact could at most be only error without prejudice.

7. The course of the examination and cross-examination of the different witnesses for the prosecution and for the defense and the evidence admitted and rejected are in many respects objected to, exceptions properly taken, and regarding the rulings thereon alleged errors are assigned. An examination of these different assignments of error does not impress us as being meritorious or as calling for a reversal of the judgment, and a discussion of the same in detail would serve no useful purpose.

8. Some exceptions are taken to remarks of the trial court during the progress of the trial, which upon examination are not regarded as being especially ill-timed or prejudicial to the rights of the defendant or as unwarrantably restrictive to counsel in the conduct of the defense. Counsel sometimes in their earnestness and zeal in the cause of their clients go so far as to render it appropriate to invoke the restraining influence of the trial court, and in this instance we see nothing more than a courteous request to counsel to desist from the further cross-examination of a witness along lines held by the court to be improper.

9. On the issue of the question relating to the previous

chastity of the prosecutrix, evidence of specific acts tending to prove that she was unchaste prior to the time of the alleged offense was offered and admitted, and it was also sought by the defense to show by evidence that her reputation for virtue and chastity in the community where she resided before the commission of the alleged offense was bad; and, because the court excluded evidence of general repute regarding the question of chastity, it is earnestly contended that grievous error was committed for which the judgment should be reversed and a new trial awarded. The statute, as has been noted, provides that, if a female child is over 15 years of age and is previously unchaste, this fact if established by the evidence would be a bar to the prosecution and would be a complete defense; and the state being required to prove its case beyond reasonable doubt, if by the evidence such doubt was raised in the mind of the jury as to the previous chastity of the prosecutrix, as alleged in the information, the accused would be entitled to an acquittal. The statute does not in words speak of the character of the prosecutrix for chastity. It declares only that the crime shall be deemed to have been committed if under the age of consent, unless the female known and abused is over 15 years of age and previously unchaste. Under a statute so worded, is evidence of the reputation of a prosecutrix for chastity admissible, or must the defense of prior unchastity be established only by evidence tending to prove an actual unchaste character, as distinguished from what it is reputed to be? Character, it is said, is "the peculiar qualities impressed by nature or habit on a person, which distinguishes him from others"; or, as is defined by some, a reputation or estimation in the community in which one is held. 6 Cyc. 892; *Bercker v. State*, 40 Neb. 810. It is observed by the author of the text above referred to that doubtless there is a distinction observed by careful writers between character and reputation. Character, where the distinction is observed, signifies the reality, and reputation merely what is reputed or understood from report to be

the reality, about a person or thing. 6 Cyc. 892. Chastity is defined to be "that virtue which prevents the unlawful commerce of the sexes." 6 Cyc. 978. In *Bailey v. State*, 57 Neb. 706, in which a construction of the language of the statute in respect of the particular question now under consideration was involved, it is held:

"A woman not 'previously unchaste' within the meaning of section 12, chapter 4 of the criminal code, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted."

These definitions and the holding in the case just cited unmistakably, we think, point to the conclusion that the fact in controversy is the previous chastity, or want thereof, of the prosecutrix, that is, the real character in its technical and stricter sense as distinguished from her reputed character; and that the evidence to establish such, when in controversy, at least to overcome the allegation of chastity, must be directed not to reputation, but to facts and circumstances of individual acts and conduct tending to prove a lack of that virtue in reality possessed by the female, which it is the object of the statute to protect. In a seduction case prosecuted criminally, *Powell v. State*, 20 So. (Miss.) 4, and which is analogous in many respects to a case like the one at bar, it is held that it is sufficient if a girl had never had sexual intercourse, although her reputation might be bad. Say the court:

"So long as a girl remains personally pure, so long as she is free from the pollution of criminal sexual intercourse, so long is she entitled to the protection of the law. * * * She may shock with the indiscretion of her speech and the freedom of her manners, and yet never have had a thought of parting with virtue, and, until she does part with her virtue, she is regarded by the law as of chaste character." See, also, *Mills v. Commonwealth*, 93 Va. 315; *People v. Kehoe*, 123 Cal. 224; *State v. Brinkhaus*, 34 Minn. 285; *O'Neill v. State*, 85 Ga. 383.

In *Kenyon v. People*, 26 N. Y. 203, under a seduction

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statute, evidence of general reputation of a female for want of chastity is held inadmissible; the words of the statute being "previous chaste character." The words "chaste character" are held to mean actual personal virtue and not reputation, and require evidence of specific acts of lewdness for impeachment. To the same effect is *People v. Nelson*, 153 N. Y. 90.

In *State v. Prizer*, 49 Ia. 531, where a statute provides for the punishment for the seduction of any unmarried woman of previous chaste character, it is held that "character" refers to moral qualities and not to reputation, and that evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity. In the opinion it is said:

"Such a character may be established by proof of particular acts, or by a course of life and conduct inconsistent with purity. A pure character may not be shown by reputation, but evidence of particular lewd conduct may be rebutted by proof of a good reputation. It will be observed that in no case can reputation be given in evidence to establish the chastity or the impurity of the woman. A good reputation being shown by the prosecutrix in rebuttal of specific charges of lewdness, the state, of course, may introduce evidence upon that issue, and assail the woman's reputation in contradiction of the evidence she has offered upon that point. It will thus be seen that evidence of reputation is not admissible upon the issue involving the woman's character, but only to discredit or support testimony tending to establish particular acts of lewdness."

The rule as stated in the authority last cited impresses us as being both reasonable and sensible, and one well calculated to subserve the interests of justice and to protect the rights of the accused. A very interesting monographic note relating to the admissibility of such evidence will be found in connection with the case of *Bradshaw v. Jones*, 103 Tenn. 331, 76 Am. St. Rep., 655. Upon both

principle and precedent, we are satisfied that the proposed evidence as offered was inadmissible, and that no error was committed in its exclusion.

10. Evidence was also offered and excluded, the purpose of which was to prove that the reputation of a girl associate of the prosecutrix for chastity was bad, and error is sought to be predicated on the ruling excluding such evidence. We are of the opinion that the court ruled correctly. While the facts regarding the conduct, action and associates of the prosecutrix which throw any light upon the question of her previous chastity, and whether she was in the habit of associating with persons of lewd and unchaste character, are proper to be offered in evidence, we do not think the rule does or ought to extend so far as to permit an issue to be raised as to the general repute for chastity of some third party with whom the prosecutrix may have associated, any more than it should be extended to her own reputed lack of virtue. While the question of her previous chastity need not be proved by direct evidence, but circumstances may be relied on to establish the fact, yet such facts and circumstances as come within the knowledge of the witnesses testifying, as distinguished from repute, embrace the limit of the admissibility of the evidence going to establish such fact.

11. It developed in the trial of the case on the issue of the previous chastity of the prosecutrix that a third party was charged with having sustained illicit relations with her before the time of the alleged offense committed by the accused, and the state was permitted to show that such third party was at the time of the trial in another state and consequently out of the jurisdiction of the court. The admission of this evidence is assigned as prejudicial error. We do not so regard it. The evidence was as favorable to the accused as to the state. It served no other purpose than to show that such party was out of the jurisdiction of the court, and to prevent any possible speculation on the part of the jury as to why his testimony was not introduced before them.

12. Some exceptions are taken as to the manner of admitting testimony in rebuttal, but upon examination we find no error in this respect. The prosecutrix, while testifying generally when first on the stand that she had been virtuous prior to the commission of the act complained of, was permitted on rebuttal to deny specific acts testified to in behalf of the defense tending to prove her unchaste. Such rebuttal testimony was not erroneously admitted.

13. An instruction is excepted to which in effect limits the testimony of subsequent acts of illicit intercourse to the sole purpose of corroborative evidence. The evidence having been properly admitted, for the reason heretofore given, it follows that the instruction in harmony with the rule governing its admissibility is without error.

14. An instruction limiting the testimony tending to prove that the accused had endeavored to have an abortion produced on the prosecutrix, solely as corroborative evidence, is also excepted to. For like reasons, this instruction was proper.

15. It is contended that the verdict is not supported by sufficient evidence. No useful purpose would be subserved in stating the evidence in detail, nor yet the substance of it only. There are in evidence many facts and circumstances of a corroborative character which materially strengthen the evidence of the prosecutrix as to the principal fact about which she testifies. The examination we have given the case as disclosed by the record convinces us that the evidence is ample to sustain the verdict, and that the controversy of fact was peculiarly one for the jury to determine, and that its determination cannot with propriety be overturned on the ground of lack of evidence to support the finding.

Finding no error in the record prejudicial to the substantial rights of the accused, we reach the conclusion that the judgment ought to be in all things affirmed, which is accordingly ordered.

AFFIRMED.

JOSEPH F. PARKINS V. MISSOURI PACIFIC RAILWAY
COMPANY.

FILED DECEMBER 21, 1904. No. 12,431.

Instructions must be consistent with each other, and if upon a fair construction of all the instructions given in a case they require that the plaintiff prove substantive facts that are not necessary to a recovery, such instructions are erroneous.

ERROR to the district court for Sarpy county: WILLARD W. SLABAUGH, JUDGE. *Judgment of reversal adhered to:*

F. T. Ransom and Weaver & Giller, for plaintiff in error.

John F. Stout, James W. Orr and B. P. Waggener, contra.

SEDGWICK, J.

In the opinion of Mr. Commissioner HASTINGS, 4 Neb. (Unof.) 13, the conclusions reached in the former opinion are discussed and, with one exception, are approved. The commissioner concluded that instruction numbered five, given by the court upon its own motion, was erroneous and required a reversal of the judgment below. In the argument before the court, this conclusion of the commissioner was mainly the subject of discussion. We have, however, reviewed the briefs and record, and have no doubt in regard to the correctness of the conclusions reached in the first opinion, 4 Neb. (Unof.) 1, unless it be with respect to the matter pointed out by Mr. Commissioner HASTINGS. The objection made to the 5th instruction is that it required the plaintiff to prove not only that the gravel in question was not refused by the defendant because it was unsuitable, in the judgment of its superintendent, for ballasting its railway, but also that "the ballast furnished under such contract was suitable for such purposes." In the next prior instruction the jury were told:

Parkins v. Missouri P. R. Co.

"If you believe from the evidence that the gravel which was delivered to the defendant was, in the judgment of the superintendent of the railway company, not suitable for ballasting purposes as provided in the contract, and that the superintendent refused to take any more for such reason, and that the plaintiff was prior to October 5, 1895, so notified, then you should find for the defendant."

So that by the 4th instruction the jury were told under what circumstances their verdict should be for the defendant, and by the 5th instruction the circumstances are stated under which the verdict may be for the plaintiff. By these two instructions, taken together, the jury must have understood that, unless the plaintiff proved that the gravel furnished by him under the contract was suitable for ballasting for the defendant's railway, he could not recover. The question is whether this is a correct statement of the law.

There was evidence that the plaintiff urged the company to accept the gravel; and that the company, by its officers and agents, other than the superintendent, in answer to these requests, gave various reasons for not accepting the gravel at that time, but made no objection to the gravel as unsuitable for ballasting purposes. The defendant insists that, as these letters were not written by the superintendent, upon whose knowledge and opinion as to the quality of the gravel the matter depended, this evidence is of no importance. It is not, however, contended that these letters were incompetent as evidence; and, having been properly received, their weight and bearing upon the question at issue was a matter for the jury to determine. The testimony of the plaintiff himself that no objection was made to the quality of the gravel, and that the refusal to receive it was placed upon other grounds, although coming from a witness highly interested in the event of the suit, is so far corroborated by the evidence referred to, and other evidence in the record, as to require this question to be fairly submitted to the jury.

The trial court in another instruction told the jury

plainly that, if the gravel offered was, in the judgment of the defendant's superintendent, unfit or unsuitable for ballasting defendant's railway, then the defendant had the right to refuse to accept the same; and again in the 2d instruction:

"The defendant must prove that he objected and refused to take the gravel as and for the reason he alleges, and so notified the plaintiff prior to October 5, 1895." If this instruction is correct, then, if the defendant did not prove this, that is, if the evidence taken altogether did not show it, the plaintiff would be entitled to recover, and it would be wholly unnecessary for the plaintiff in addition to this fact to also prove that the gravel was, in fact, suitable for ballasting the defendant's railway. The defendant, of course, could not, during all the time the question of receiving the gravel was pending, lead the plaintiff to believe that, in the judgment of the superintendent, the gravel was suitable by raising other objections and giving other reasons for not receiving it, and, not having at any time notified the plaintiff that the gravel was unsuitable, defend upon that ground when sued. This would be the rule even though the fact were that the gravel was unsuitable for the uses for which the defendant desired it. If the jury were satisfied from the evidence that the defendant had not refused or objected to receive the gravel on the ground that it was unsuitable, in the judgment of its superintendent, the verdict should have been for the plaintiff. If it was established that the defendant had objected and refused to receive the gravel because, in the judgment of its superintendent, it was unsuitable, then the question might be whether this judgment of the superintendent was reasonable and based upon sufficient grounds; and upon that question it would be competent to show what the fact was in regard to the quality of the gravel and its suitability for the purposes for which the defendant intended it.

We think that the reasoning of Mr. Commissioner HASTINGS upon this point is sound, and the conclusion

that instruction number five is erroneous is right. The judgment of reversal is therefore adhered to.

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the foregoing opinion, for the following reasons:

When this case was before us the first time we affirmed the judgment of the trial court, 4 Neb. (Unof.) 1. Our second opinion, written by Mr. Commissioner HASTINGS, reverses the judgment of that court, 4 Neb. (Unof.) 13, and the majority now adhere to that opinion on the same ground and for the same reason set forth therein, to wit: that the court erred in giving instruction No. 5, because it required the plaintiff to prove more than was necessary to entitle him to recover. The pleadings are fairly set forth, in substance, in our first opinion, and no fault is found with, or criticisms passed upon, the facts or issues as stated therein; therefore, no further statement of the case will be made in this dissenting opinion. It is sufficient to say that the petition set forth the contract; alleged the breach of it by the defendant; stated that the plaintiff was at all times ready and willing to perform his part thereof; set forth the amount of his damages, and prayed for a judgment therefor.

The answer admitted the making of the contract, and the plaintiff's part performance; admitted that defendant refused to receive any more gravel thereunder; and affirmatively alleged as a reason for its refusal and as a defense to the plaintiff's petition that the gravel furnished by him was, in the judgment of the defendant's superintendent, unfit and unsuitable for ballasting purposes, and was, in fact, unfit therefor; that the defendant, during the life of the contract, notified the plaintiff of that fact, and thus terminated it according to its terms. The plaintiff by his reply alleged affirmatively that the gravel was, in fact, and in the judgment of the defendant's superintendent, fit and

suitable for ballasting purposes; that it was the kind of gravel contracted for; that the defendant had received 21,816 cubic yards thereof, as stated in the petition, and had used the same for ballasting its roadbed, and that the defendant, without reason, arbitrarily refused to receive the balance of the gravel contracted for by the agreement in question, after the expiration of the contract, for the purpose of avoiding and escaping its liability under said contract. The formal denials contained in the reply were rendered nugatory by these averments, because this new matter was inconsistent with such denials. This rule of construction is the one which should be applied to the reply, for it accords with the rule adopted by all of the courts in this country. In *State v. Hill*, 47 Neb. 456, it was held:

"Where the petition alleges the delivery of the official bond declared on, the allegations in the answer of a surety—following an averment therein that he signed upon condition the principal should also sign—that 'if it (the bond) was ever delivered, it was done in violation of the express condition aforesaid upon which the defendant signed said instrument,' must be treated as a substantial admission of the delivery of the bond."

When the plaintiff alleged in his reply that the gravel in question was suitable, in fact, and in the judgment of the defendant's superintendent, for ballasting purposes, and that the defendant, acting without reason and arbitrarily, and for the purpose of avoiding and escaping its liability under the contract, refused to receive the balance of the gravel contracted for, he clearly admitted the allegations of the defendant's answer as to notice and the termination of the contract, and assumed the burden of proving affirmatively that the gravel in question was, in fact, and in the judgment of the defendant's superintendent, suitable for ballasting purposes; that the defendant's refusal to receive it was arbitrary, and made for the sole purpose of avoiding its liability under the contract. That this was the legal effect of the plaintiff's reply seems be-

yond question. *Ketelman v. Chicago Brush Co.*, 65 Neb. 429; *Dinsmore & Co. v. Stimbert*, 12 Neb. 433; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349; *Johnson v. Hesser*, 61 Neb. 631. It is unnecessary to cite further authority to support this well settled rule.

The plaintiff, having by his own pleadings assumed the burden of proof as to the matters above stated, introduced no evidence whatever in support of the allegations contained in his reply; while the defendant's superintendent testified that in his judgment, and in fact, the gravel was unsuitable for ballasting defendant's road; that under his orders notice of that fact was given to the plaintiff, as soon as it was possible to determine it, and the contract was thus terminated before its expiration. The plaintiff not only failed to controvert this evidence, but tacitly admitted that numerous conversations had occurred between himself and the defendant's superintendent about the quality of the gravel; that the question was discussed between them of how to treat it, and what, if anything, they could put with it to render it suitable for the defendant's use. Under the pleadings it would have been proper for the court to have instructed the jury that the burden of proof was on the plaintiff to show that the gravel in question was, in fact, and in the judgment of the defendant's superintendent, fit for its use; and that the defendant's refusal to take the same was arbitrary and unwarranted by the facts. And yet, by the instruction complained of, the jury were told generally that if they found these facts affirmatively the plaintiff would be entitled to recover. The instruction was general in its terms, and applied to the defendant's evidence as well as that of the plaintiff. The jury must have understood that it applied to all of the evidence in the case. It fairly covered the issues presented, and in such a way that the plaintiff had no right to complain of its effect. In fact it was much more favorable to him than to the defendant. It thus seems clear that my associates have failed to properly analyze the pleadings, and are mistaken as to the

real issues presented by them. It is conceded that the plaintiff was bound to show that the action of the defendant's superintendent was arbitrary and unwarranted. The only way he could do this was to prove that the gravel in question was in fact suitable for the defendant's use, and was such as was contemplated by the contract. For these reasons, it is apparent that the court did not err in giving the instruction complained of. Again, it seems clear from the record that under the pleadings and the evidence, as contained therein, a judgment for the defendant is the only one that could have properly been rendered. For this reason, if for no other, the instruction did not prejudice the plaintiff's rights.

For the foregoing reasons, it seems to me that our second opinion should be set aside; that our first opinion should be adhered to, and the judgment of the district court affirmed.

STATE OF NEBRASKA, EX REL. WILLIAM J. ELLINGSWORTH,
RELATOR, V. ALFRED G. CARLSON ET AL., RESPONDENTS.

FILED DECEMBER 21, 1904. No. 13,851.

1. **Injunction: JURISDICTION.** An injunction order made by a court which has no jurisdiction over the matter involved, or which is in excess of the powers of the court granting it, is void.
2. **Election Board: DUTIES.** The duty of an election board to canvass the votes cast at the election is a political duty plainly prescribed by a positive statute, and cannot be enjoined by the courts.
3. **Mandamus: DEFENSE.** It is not a defense to an application for a writ of mandamus that the action which it is sought to compel has been enjoined, if it appears conclusively from the record, or from the conceded fact in the case, that the court which issued the injunction order had no power to enjoin the act in question.
4. **Costs.** When public officers refuse to perform a statutory duty and are compelled to do so by mandamus, the costs of the mandamus proceedings will be adjudged against them when the relator is

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himself without fault, notwithstanding that the officers were acting in obedience to an injunction order, supposed by them to be valid, but which was in fact void for want of power of the court issuing it over the subject matter.

ORIGINAL application for a writ of mandamus to compel respondents to canvass the votes for village trustees. *Writ allowed.*

Thomas Darnall, E. A. Cook and W. D. Giffin, for relator.

E. C. Calkins and H. V. Calkins, contra.

SEDGWICK, J.

In April, 1904, there was held in the village of Gothenburg an election of members of the board of trustees of the village. At the close of the election, and before the votes had been canvassed, one John Strahle, alleging that he was an elector of the village of Gothenburg, began a proceeding in the county court of Dawson county to contest the election of Carroll, Weideranders and Ellingsworth, three of the candidates at said election, each of whom had received, it is conceded, a majority of the votes cast at the election for the office of trustee. On the same day that he commenced this contest in the county court, the said Strahle began an action in the district court for Dawson county for the purpose of enjoining the board of trustees of the village of Gothenburg from canvassing the votes cast at the election, and in that action he obtained from the county judge of Dawson county a temporary order of injunction restraining the board of trustees from canvassing the vote. Afterwards, his contest proceedings having been tried in the county court, and having resulted against him, and having been taken to the district court, both actions were tried in the district court, and determined against the contestant Strahle. He has brought both actions to this court for review. The district court, having upon the final hearing dissolved the temporary injunction restraining the board from canvassing the votes,

fixed the amount of the supersedeas bond to be given by the plaintiff therein to supersede the judgment of the district court during the pendency of the action in this court, which bond was given by the plaintiff and duly approved, and the cause is now pending in this court. Thereupon this action was brought to obtain a writ of mandamus to compel the village board to proceed and canvass the vote notwithstanding the injunction. The parties have stipulated the facts upon the record, and the question is whether the injunction was effectual to prevent the canvassing of the votes.

In *Calvert v. State*, 34 Neb. 616, the plaintiff in error had been adjudged guilty of contempt in violating an injunction order of the district court, and in reversing that judgment the court by MAXWELL, C. J., said:

"The question presented to this court is the power of a judge at chambers, upon the issues presented, there being disputed questions of fact, to make the order in question. In any case where the court or judge has jurisdiction and grants an injunction during the pendency of a suit, the injunction while in force must be obeyed. A court should exercise great care in granting such relief, and only where it is clear the injury to the plaintiff will be great or irreparable; but having granted it the adverse party should move to dissolve or modify and cannot disregard it with impunity. A court must insist that its legitimate orders be obeyed. This is necessary both for the protection of private rights and those of the public. If the court or judge exceeds his jurisdiction, however, his action in the premises is like that of any other person who acts without authority. * * * Suppose the owner of a farm, or one or more city lots, should apply for an injunction to restrain the construction of a railway across his land, and should set forth the same facts as to his ownership and possession as the defendant has done in this case, and the railway company should allege the same facts as are stated in the plaintiff's petition, would the court or judge on a preliminary hearing have authority to tie the hands

of the landowner and permit the adverse party to divest him of his rights and destroy his possession? The statement of the case carries with it a full answer. The judge, in effect, has undertaken to dispose of the merits of the case without a hearing. A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in the property, it is simply void. *People v. Simonson*, 10 Mich. 335; *Port Huron & G. R. Co. v. Judge*, 31 Mich. 456; *Salling v. Johnson*, 25 Mich. 489; *McCombs v. Merryheir*, 40 Mich. 72; *Arnold v. Bright*, 41 Mich. 207; *Taras & B. C. R. Co. v. Judge*, 44 Mich. 479, 7 N. W. 65. Judge Cooley, in *Arnold v. Bright*, *supra*, says: "The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. In several cases it has been decided that possession of lands is not to be disturbed by means of a preliminary injunction. *Hemingway v. Preston*, Walk. Ch. (Mich.) 528; *People v. Simonson*, 10 Mich. 335."

It is said by Mr. High in his work on Injunctions, vol. 2 (4th ed.), sec. 1425:

"While it is thus seen that courts of equity exact the most implicit obedience to the writ of injunction, and treat its wilful violation as a most flagrant contempt of court, the doctrine is to be understood with the qualification that the court has jurisdiction over the subject matter in controversy. And if the court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an injunction in a matter beyond its jurisdiction, its injunction will be treated as absolutely void, and defendants cannot, in such case, be punished for contempt for its alleged violation. For example, when an injunction is issued against a board of township officers to restrain them from holding an election which they are authorized by law to hold, equity having no jurisdiction to interfere in such case, there can be no disobedience of the injunction and no attachment for contempt, since the

mandate of the court is absolutely void. So where a court has exceeded its powers by granting an injunction in a matter over which it has no jurisdiction, as by enjoining a board of municipal officers from canvassing the returns of an election, the court having no power to hear or determine such controversies, its injunction will be treated as absolutely void, and a punishment inflicted for its violation will not be upheld."

One of the cases referred to by Mr. High in support of this doctrine is *Dickey v. Reed*, 78 Ill. 261. In that action an injunction had been granted restraining the common council of the city of Chicago from canvassing the returns made to them by the judges and clerks of election. The defendants were advised by their counsel that the injunction was void, and that they might safely disregard it. The council then proceeded to canvass the returns. They were cited for contempt by the circuit court from which the injunction had issued, and upon judgment being entered punishing them for such contempt they appealed to the supreme court. In the opinion it is said:

"Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? Suppose a person were to conceive a law to have been unconstitutionally enacted, could he, by bill, restrain the governor and all other officers from executing it until a hearing could be had and the law declared valid? Suppose a citizen, in his hostile opposition to a governor elect, or from other motives, were to conceive that he had obtained his apparent majority by fraud, could he apply to a court for and obtain an injunction to restrain him from becoming inaugurated, until by delays and appeals, the term for which he had been elected should expire, and thus defeat the will of the people? * * * In this case there was a complainant, who had exhibited a bill, and there was a subject matter for litigation, and the controlling question is, whether the court, under any circumstances, could have power to hear, determine and decree in reference to it. If not, then the

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whole proceeding was *coram non judice*. The law under which this election was held, neither in terms nor by implication confers the power. Nor is it asserted that the court had facts before it which required it to take judicial cognizance, and hear, adjudicate and decree. On the contrary, the court refused to continue the injunction, thus virtually deciding that the court was powerless to afford the relief sought, and thereby permitting the injunction to come to an end by the terms of the order awarding it, and we are clearly of opinion that it was not a case for equitable interposition. * * * In *Walton v. Dercling*, 61 Ill. 201, it was held, where an injunction was issued to restrain officers from holding an election, and it was disobeyed, that they were not amenable to the process or liable to be punished for a contempt in disobeying the writ. And it was upon the grounds that the writ was void for the want of power, and the law required the officer to perform this particular duty. The distinction was there taken that, where the court has power over the subject matter, and authority to take such jurisdiction, and the court acts, its process must be obeyed; but where the power is wholly wanting, then the process is void, and need not be obeyed. The same rule was recognized and applied in *Darst v. People*, 62 Ill. 306. So the doctrine is by no means novel in this court."

In *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233, the court said:

"It is insisted by the relator that the proceedings by the canvassers were illegal and void, because they were enjoined by the order of a judge of the circuit court from further proceeding until the further order of the circuit judge; and that the respondents did proceed to declare the partial result of the election, of which the relator complains, before the dissolution of the injunctive order and without a further order of the judge. We think the order of the circuit judge was unadvisedly made, and that in its form and effect it was essentially a perpetual injunction. It forbade the further proceeding until permis-

sion should be granted by the judge, and was in effect the abrogation of a statute which authorized and required them to proceed with reasonable dispatch, and it was therefore illegal."

Scott v. McGuire, 15 Neb. 303, was an action to enjoin the county commissioners "from removing the county seat * * * or any of the county offices or county records or papers' from the town of La Porte to the town of Wayne." An election had been held upon the question of removing the county seat, and it appeared in the case inferentially that the result was in favor of Wayne. The opinion, after stating that the object of a contest of election is to have the declared result of the election vacated, says:

"This, however, cannot be reached by an order of injunction restraining county officers from removing their offices to the relocated county seat, and transacting business there, but by a judgment formally setting aside the result arrived at and declared by the canvassers of the votes cast at the election, in an action brought to contest it. Such an injunction would compel a violation by these officers of a positive command of the statute * * * that on the relocation of the county seat, they 'forthwith remove their respective offices, and all county records, papers, and property in their offices or charge to the place where said county seat shall have been relocated,' a severe penalty being provided in case of a refusal to do so. This is a valid enactment which the courts have no right to disregard by requiring others to disobey it."

And so the statute provides that immediately after the election the board shall canvass the votes, and that a contest may be begun after (not before) the canvass is made. The injunction in this case attempted to prevent this canvass of the votes. There can be no circumstances under our statute which will authorize the courts to so interfere and stop the election board from performing this plain statutory political duty. It follows that the injunction order made by the district court was absolutely void

and should have been disregarded by the canvassing board. As all of the facts are agreed upon by the parties and the relator is plainly entitled to the relief asked, a peremptory writ will be ordered upon the application filed.

2. It is alleged in the answer herein that the respondents are not interested in the result of this litigation, and that they are ready to perform their duty whenever it is made plain to them by the proper authorities, and they therefore ask that no costs be taxed against them in this case. The party who obtained the injunction order is not a party to this proceeding and costs cannot therefore be adjudged against him herein. There is but very little in the record bearing upon the question of the good faith of the respondents. It is conceded in the stipulations, that is, it is alleged in the affidavit of the relator, and admitted by the respondents, that "the majority of said trustees, said A. G. Carlson, F. E. Carlson and Habbe Janssen, refuse to canvass said vote." Upon this evidence we think the costs in this case must be adjudged against these parties.

It was said by the supreme court of Illinois in *Dickey v. Reed*, *supra*:

"It is true that officers and others may be embarrassed as to their course of action in such cases. They must act at their peril under all such circumstances. They can, as the parties did in this case, call to their aid able counsel, learn their duty from all available sources, and then act and abide the consequences. If the advice they procure be wrong, it will be their misfortune, and the incorrect advice will not excuse the offense or mitigate the punishment."

It does not appear that these respondents took the advice of counsel with special reference to their disinterested duty in the matter. The relator herein is at least equally innocent with themselves, and the ordinary rule for taxing costs must be applied. The costs of these proceedings therefore will be taxed against the respondents A. G. Carlson, F. E. Carlson and Habbe Janssen.

WRIT ALLOWED.

HARRY TRAYER ET AL. V. NORA SETZER.

FILED DECEMBER 21, 1904. No. 13,563.

1. **Husband and Wife: ACTION.** In this state the common law disability of husbands and wives to maintain suits at law against each other upon contracts between them has been removed by statute.
2. **Illegitimate Children.** The marriage of the parents of illegitimate children does not legitimate the latter, except upon the conditions prescribed by section 31, chapter 23 of the Compiled Statutes.
3. ———: **SUPPORT: BOND.** The moral obligation of the father of illegitimate children to provide for their support is a sufficient consideration for his bond so to do.
4. **Bastardy: FRAUD.** Bastardy proceedings begun against the father are not abated by his fraudulent marriage with the mother not consummated by cohabitation with but followed by immediate abandonment of her.

ERROR to the district court for Nemaha county: JOHN S. STULL, JUDGE. *Affirmed.*

John C. Watson and B. F. Neal, for plaintiffs in error.

J. S. McCarty and H. A. Lambert, contra.

AMES, C.

The facts in this case are not in dispute and are narrated in the brief of plaintiff in error as follows:

"As appears by the petition filed in the court below the defendant in error, Nora Setzer, commenced before the county court against Henry Trayer, one of the plaintiffs in error, a prosecution for bastardy. The bastardy complaint was filed on the 17th day of January, 1902, by Nora Setzer, the defendant in error, whose name was at the commencement of this action in the district court, Nora Trayer. On the 2d day of February, 1902, the prosecutrix was delivered of twins. That on the 31st day of January, 1903, the prosecutrix and the said Harry Trayer

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were married and the bonds of matrimony had never been dissolved. That after the marriage it was brought to the attention of the district court for Nemaha county that the said Harry Trayer refused to live and carry out his marriage vows with his then wife, and he, Harry Trayer, 'was brought into court where he appeared with his attorneys in open court at the regular February, 1903, term, thereof, and on said bastardy proceedings being called up and coming on for trial, he pleaded guilty thereto and in open court admitted that he was the father of said children,' whereupon the court adjudged the said Harry Trayer to be the father of said bastards and required him to enter into a bond with sureties for the payment of \$1,000 for their support and maintenance, and thereupon the bond in suit was entered into by the defendants (plaintiffs in error) as such sureties. Thereafter, to wit, on the 16th day of May, 1903, the plaintiff instituted this action against the said Harry Trayer and his bondsmen, John Trayer and Albert Moody, plaintiffs in error herein. The plaintiffs in error answered, and the defendant in error replied thereto, setting up the above facts. The plaintiffs in error filed a motion for judgment upon the pleadings, which motion was overruled, and the court then permitted the plaintiff to call a jury, prove her bond, and entered judgment thereon. Plaintiffs in error filed motion for a new trial which was overruled. This action is brought to reverse the aforesaid proceedings."

No objection was made in the district court to the prosecution of the action in the name of Nora Setzer instead of that of Nora Trayer, and as such an objection is merely formal and not affecting the merits, it cannot be made for the first time in this court. It cannot be doubted that the plaintiff is the person for whose use and benefit the bond was given and is the real party in interest, whatever may be her true name.

It is urged by plaintiffs in error that husband and wife are, in legal contemplation, but one person, and are incompetent to sue each other at law, but this court in *May*

v. May, 9 Neb. 16, decided that question the other way, and it is not worth while to reopen the discussion.

It is next contended that the marriage of the parties legitimized their offspring; and that a wife cannot maintain a proceeding in bastardy against her husband to compel obedience by him to his marital obligations. We think, however, that section 31, chapter 23, of the Compiled Statutes, 1903 (Annotated Statutes, 1931), expressly negatives the idea that under circumstances like those in this case the marriage legitimizes the offspring. To accomplish that end the parents must, after the marriage, have had other children, and the father must have adopted the bastard into his family or acknowledged him in writing signed in the presence of a competent witness. This statute has, it is true, direct reference only to title to property by descent, but it is the only statute in this state relating to legitimation, and may fairly be taken as expressive of legislative policy with reference to the whole subject. None of these conditions is satisfied in this instance. Trayer has never cohabited with the plaintiff as her husband, or contributed toward her support or that of her children, and his nominal marriage to her was evidently a fraudulent device to defeat the proceeding in bastardy. To allow this defense would be to permit him to perpetrate a barefaced fraud not only upon the mother, but upon the public who are entitled to be protected from the consequences of his wrong doing. All the authorities cited by plaintiffs in error are either from states in which the wife is under a legal disability to sue her husband at law, or are cases in which the offspring had been legitimated in accordance with a local statute. Such authorities are, of course, not in point.

Plaintiffs in error do not deny that, but for the foregoing objections, the instrument sued upon is valid and enforceable, and no reason occurs to us why it is not so. The father is under a moral obligation to support his children, and that duty alone, even in the absence of the bastardy statute, is without doubt a sufficient consideration

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for a bond conditioned for its performance. The practical situation in this case is not different to what it would have been if the marriage had not taken place, and it would be a reproach to the law if the defendant in error and the public are both without remedy.

We recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, C.C., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

GEORGE W. HAWKE V. ANDREW KERR.

FILED DECEMBER 21, 1904. No. 13,647.

Review. When the verdict and judgment are such as alone could be upheld by the undisputed and indisputable evidence, the court will not examine the record for the ascertainment of alleged errors occurring at the trial.

ERROR to the district court for Gage county: JOHN S. STULL, JUDGE. *Affirmed.*

E. F. Warren and E. O. Kretsinger, for plaintiff in error.

Hazlett & Jack, contra.

AMES, C.

This is an action for damages for breach of an alleged oral contract by the defendant to borrow a sum of money from the plaintiff for a term of years, and to secure the repayment of the same, with interest, by a mortgage upon lands of the defendant. The answer pleads the statute of limitations and the statute of frauds, together with a general denial. The evidence fails completely to establish the agreement set forth in the petition, but it

is shown, with but little if any dispute, that the defendant's lands were subject to sale upon existing decrees of mortgage foreclosure, and that the plaintiff agreed to purchase them at judicial sale, and hold the title in trust to convey them to the defendant at the expiration of a specified term of years, upon being repaid the purchase price and interest, and that the lands, without the fault of the defendant, who had no control over the decrees of foreclosure, were not advertised or offered for sale. The only controversy in this respect is as follows: Certain lands of the defendant were exposed to sale under a decree against them, and he contends that they were all that were the subject of his agreement with the plaintiff, and that the latter by refusing to buy them committed a breach of the agreement himself; but the plaintiff contends that the agreement included other lands which were not offered, and that he was therefore excused from buying those that were so. Under the circumstances we do not see how this dispute is material.

There was a verdict and judgment for the defendant, and the plaintiff prosecutes this proceeding, alleging several errors as having occurred at the trial. There is a wide if not fatal variance between the contract alleged in the petition and that proved at the trial; and of the latter, which was never perfected, the defendant is not shown to have been guilty of a breach. There are a large number of alleged errors assigned in the petition in error and in the brief of counsel which we do not feel called upon to discuss because, granting them to be well assigned and to be as flagrant as it is contended that they were, they did not contribute to the establishment of the above recited facts, about which there is no real dispute, nor would their absence have disclosed a different condition of affairs. In our opinion the verdict is the only one which could have been upheld by the undisputed evidence, and we recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

FIDELITY & DEPOSIT COMPANY OF MARYLAND V. ARNOLD P.
LIBBY.

FILED DECEMBER 21, 1904. No. 13,648.

1. **Indemnifying Bond: DURATION.** A bond of indemnity, not stipulating how long it shall remain in force, but covenanting that so long as it shall so remain the obligor shall be paid an annual premium in advance, does not require the payment of the premium so as to continue the obligation, but leaves the obligee at liberty to decline to make payment and thus put a period to the contract so far as the rights of third persons are not affected.
2. **Official Bonds: STATUTE: AMENDMENT.** The act of 1895 (Laws 1895, ch. 22) entitled "An act to facilitate the giving of bonds, undertakings and recognizances, and to authorize the acceptance of certain corporations as surety thereon, and to repeal all acts and parts of acts in conflict herewith," is ineffectual as an amendment or repeal of chapter 10 of the Compiled Statutes, entitled "Bonds and Oaths—Official," or to dispense with personal sureties upon official bonds as required by that chapter.

ERROR to the district court for Johnson county: JOHN
S. STULL, JUDGE. *Affirmed.*

S. P. Davidson, for plaintiff in error.

Hugh La Master, contra.

AMES, C.

On the 11th day of January, 1902, W. W. Wheatley was inducted into the office of treasurer of Johnson county, and appointed the defendant Libby as his deputy. Wheatley had procured the plaintiff to become surety on his official bond, and as part consideration therefor had

promised the plaintiff that it should be permitted, for a stipulated premium, to execute as surety the official bond of the deputy. Both bonds were executed accordingly, and were accepted and approved by the proper authority. Libby made a written application for his bond, reciting that it was to be executed in consideration of an annual premium of \$50, payable annually in advance, which was to be paid by Wheatley, and the latter did pay the first year's premium accordingly. At the expiration of the first year, namely, on the 30th day of December, 1902, the deputy executed another official bond with personal sureties, to the acceptance and approval of the county board, and on the 27th day of January following, the board, in session, entered an order reciting the giving and approval of the last-mentioned instrument, and purporting to release and discharge the plaintiff from liability because of the then future liability of the deputy. Both Libby and Wheatley then refused to pay the second year's installment of premium in consideration of the bond executed by the plaintiff, and this action was brought against the former for the recovery of the same. Neither the application nor the bond recited a prospective term of the principal's office or of the continuance of the obligation, except that the former stipulated that Libby should pay "fifty dollars (\$50) per annum in advance, while said bond shall continue in force," from which it is implied that it continued in force for the term of at least one year ensuing the payment of any such instalment.

The plaintiff contends that it is also implied that the obligation was to continue during the incumbency of Libby under his then present appointment as deputy; that he was not discharged from his office at the time of the giving of the new bond, but remained continuously therein; and that the county board were powerless to impair the obligation of the contract or to release the plaintiff from its obligation thereon. We suspect that if it should turn out that Libby has defaulted since the expiration of the first year the plaintiff will entertain a different opinion. The fair

inference, from the recitals in the application, of which both the treasurer and the county board had full knowledge, is that the plaintiff undertook to become and remain bound so long, and so long only, as the agreed annual premium should be paid in advance. In this respect the contract is of the same character as the ordinary policy of insurance, to which it is generally analogous and out of which it grew. It is a contract for one year, renewable annually by the payment of a stipulated premium. If the premium is not paid it "lapses" or ceases to be obligatory as between the parties to it, except as to past transactions, although there may or may not be circumstances continuing it in force as to interested third persons, about which we express no present opinion. If in the present instance the county board might have perpetuated the obligation by reliance upon estoppel in ignorance of the delinquency of the second annual premium, it does not occur to us that they were bound so to do, or that the plaintiff has been injured or has any just ground of complaint because they saw fit to discharge the estoppel, which we have no doubt they had power to do and did effectively do. The appointment of a deputy county treasurer is not for a fixed term, but is revocable at pleasure. There was no formal revocation and reappointment in this instance, but the conduct of the deputy and of the county board was with the knowledge and concurrence of the treasurer and, we think, amounted thereto in practical effect. Whether such a bond would be insufficient for the induction into office of a person elected for a fixed term of more than a year, or, if not, whether deferred premiums would be recoverable in such cases, are questions not involved in the case. Seemingly one consequence or the other is inevitable.

We are also of the opinion that the instrument in controversy is not a legal contract, but derives whatever obligatory force it has from principles of estoppel. Section 9, chapter 10 of the Compiled Statutes enacts that official bonds of all county officers shall be executed by the principal, and at least two sufficient sureties who shall

be freeholders of the county. This requirement doubtless has reference to natural persons. The instrument in suit was supposedly executed pursuant to chapter 16 of the Compiled Statutes, which was passed in 1895, under the title, "An act to facilitate the giving of bonds, undertakings and recognizances, and to authorize the acceptance of certain corporations as surety thereon, and to repeal all acts and parts of acts in conflict herewith." The fourth section of the act reads: "All acts and parts of acts in conflict herewith are hereby repealed." Laws, 1895, chapter 22. Neither in the title of the act, nor in the repealing clause, is there any reference to the subject of official bonds, nor will anyone suppose that section 9 of chapter 10, above quoted, is repealed so that an official bond with personal securities is no longer authorized. If anything had been accomplished it would have been an amendment of that and several other sections of the same chapter so as to permit the approval of bonds by corporations in lieu of, or in substitution for, bonds required to be given by law. But such a purpose is not indicated by the title, nor is any section of any existing statute set forth or referred to, as sought to be amended, in the body of the act. We are of opinion that to hold that this act authorizes the acceptance of bonds of corporations in lieu of, or in substitution for, official bonds required by chapter 10 of the Compiled Statutes would be in plain violation of section 11, article III of the constitution. Chapter 10 of the Compiled Statutes is an act complete in its itself, having sole reference to the subject of official bonds, concerning which it makes specific and imperative regulations. We are of opinion that it cannot be amended by an act in the title or body of which that subject is not mentioned.

There was a judgment for the defendant both in a justice's court, where the action was begun, and in the district court upon appeal. The plaintiff prosecutes error. We recommend that the judgment be affirmed.

LETTON and OLDHAM, CC., concur.

Fielding v. Chicago, B. & Q. R. Co.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

PETER B. FIELDING V. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY.

FILED DECEMBER 21, 1904. No. 13,669.

Directing Verdict. Upon the undisputed evidence the trial court rightfully directed a verdict for the defendant.

ERROR to the district court for Custer county: HANSON M. GRIMES, JUDGE. *Affirmed.*

C. W. Beal and N. T. Gadd, for plaintiff in error.

J. W. Deweese and Frank E. Bishop, contra.

AMES, C.

Plaintiff, Fielding, was a section-hand, and Anderson was his foreman, employed by the defendant company at Mason City in this state. The track extends easterly and westerly past the station. At some point west of the station the two men loaded some railway ties on a push car. Fielding placed himself at the west end of the north side of the car and pushed it eastward. Anderson followed along at the west end of the south side, and as the car moved forward threw or pushed the ties off from it, at intervals, so that they fell at the south side of the track and remained where they struck the ground. After they had traveled some distance and the ties had all been removed in this manner, Anderson told Fielding to return westward with the empty car to the starting point. The latter then went to the east end of the south side of the car and sat down upon it with his back toward the west, and with his right foot

hanging down so as to come in contact with the south ends of the ties upon which the track was laid, and began propelling the car westward by kicking and pushing against them. It was broad daylight; the men had cooperated in placing the loose ties where they were, which was in plain sight, and both knew that some of them were lying very close to the track in violation of the rule of the company forbidding such things to be left by section-men nearer thereto than three feet. Fielding did not look westward in the direction in which he was pushing the car, or make any particular or especial observation respecting the position of the loose ties. After he had gone some distance his attention was attracted by a call from Anderson, and while he was looking toward him his right foot with which he was "kicking ties" was caught between a loose tie, lying within a few inches of the track, and the flange of the car wheel, and injured thereby. This action was brought to recover damages for the injury. The petition is in the usual form, and the answer is a general denial, coupled with a plea of contributory negligence. There is no conflict in the evidence, and at the conclusion of the trial Judge Grimes directed a verdict for the defendant, and rendered judgment accordingly. The plaintiff prosecutes error.

If Anderson was guilty of negligence in the manner in which he distributed the ties and in permitting them to remain where they alighted, Fielding, who was an experienced workman of mature years and acquainted with the rules of the company, was fully aware of that fact and participated in the fault. The plaintiff did, and was required to do, nothing by the command or direction of Anderson that contributed to the injury, of which the manner in which he propelled the car, and his lack of care in so doing, was the sole proximate cause.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

Chicago, B. & Q. R. Co. v. Anderson.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v.
ALBERT H. ANDERSON.

FILED DECEMBER 21, 1904. No. 13,681.

1. **Statute: TITLE.** The title, "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor," contains only one subject.
2. **Carriers: FREIGHT RATES: VALIDITY.** A statute forbidding railroad companies to charge for transportation for any specific distance a greater sum than they charge for carriage over a greater distance is within legislative discretion and is valid.

ERROR to the district court for Kearney county: Ed L. ADAMS, JUDGE. *Affirmed.*

J. W. Deeweese and Frank E. Bishop, for plaintiff in error.

M. D. King, contra.

AMES, C.

The defendant operates a line of railroad extending from Curtis, in this state, eastward through Axtell to Minden. In the winter there are ice-fields at Curtis, from which people both at Axtell and Minden may be supplied, but at the latter place alone is there competition with another railroad. In order to meet such competition, so that Curtis ice will be purchased for consumption at Minden, it became necessary to transport it between the two last named points during the winter of 1902 for a freight

charge of three cents a hundred pounds, which the defendant did continuously in the months of January and February in that year. During the same months the company transported ice from Curtis to Axtell for the defendant in error, Anderson, for which service it demanded and received compensation at the rate of four cents a hundred pounds. The difference in distance is 10 miles in favor, of course, of Axtell. This action was brought by Anderson to recover the difference of one cent a hundred pounds between the charge made against him and the rate in force at the same time between Curtis and Minden. There was a judgment for the plaintiff in a justice's court, and afterwards on appeal in the district court, and the defendant below prosecutes error. The facts as above recited are not in dispute.

Article V, chapter 72, Compiled Statutes, 1903 (Annotated Statutes, 10008), is an act entitled "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor." Approved February 28, 1881. Laws, 1881, ch. 68. Section 2 of that act is as follows:

"No railroad company in this state shall hereafter charge, collect or receive for the transportation of any merchandise or other property upon the railroad owned or operated by such company within the state a higher rate for such service than was charged by such company for the same or like service on the first day of November, A. D. 1880, as shown by the published rates of such company. And no railroad company shall demand, charge, collect or receive for such transportation for any specific distance, a greater sum than it demands, charges, collects or receives for a greater distance."

It is contended that this section, if not the whole act, is void because of duplicity of subjects in the title. In support of this contention it is argued that the subject of fixing a "maximum standard of freight charges upon railroads" is separate and distinct from that of preventing

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unjust discrimination, and secret rates, rebates and drawbacks therein and therefor. We are unable to agree with this view, because, as it seems to us, the prevention of all these latter mentioned practices is essential to the fixity, that is, maintenance, of any standard whatever. There are indeed standards of conduct in plenty, variation from which is permitted and even contemplated, but they cannot properly be called "fixed standards" in the sense of being settled, firm, immovable, in which sense it seems to us evident that the legislature used the qualifying word in this instance. A standard of freight rates from which transportation companies should be permitted to depart at will, generally or specially, openly or secretly, could hardly be regarded as a real or true standard in any sense. Counsel for plaintiff in error admit, in argument, that the subjects are so nearly related in nature that they might properly have been united in the title to one bill or act, but they say that the syntactical arrangement of the title in this instance is such as to divide them into two or more distinct classes. If this were true, we should think that the line or lines of discrimination would need to be very clearly and obviously drawn, so as to be apparent without careful scrutiny, in order to defeat an act of the legislature of the validity of which every reasonable presumption is to be indulged. A very slight transposition and reconstruction of the sentence suffices, as we understand counsel, to meet their own requirements. Omit the disjunctive "or" and the adverbs "therein" and "therefor," whose auxiliary offices are requisite only for definiteness of expression, and transfer the words "of freight charges on railroads" to the end of the sentence, and the singleness of subject becomes evident. The title will then read: "An act to fix a maximum standard and to prevent unjust discrimination, secret rates, rebates or drawbacks of freight charges on railroads." Surely an important legislative enactment ought not to be annulled for so slight an error, if it is an error, of syntax.

We do not feel called upon to enter upon the inquiry

whether the discrimination complained of in this instance was just or unjust, considered solely in the light of the circumstances in which it was made. It is said in some of the decisions that the justice or injustice of freight rates is a judicial rather than a legislative question, and in the connection in which this utterance has been made we do not know that it is open to criticism; but it is not to be overlooked that legislative, executive and judicial functions merge in each other by imperceptible degrees, so that it is often impossible to distinguish clearly between them, and that the exercise of discretion and judgment by the legislature is indispensable to the framing and enactment of any statute. So long as they keep within their province, the courts are not at liberty to sit in review of their conduct, or decide upon its wisdom or justice. By section 2 of the act above quoted, the legislature determined that it is unjust for a railroad company to charge for carriage for any specific distance a greater sum than it charges for a greater distance, and absolutely prohibited the practice. We are unable to say that we are better qualified to decide upon this matter than were the members of the two houses, or that, if we were so, there is anything in the nature of the judicial office that confers upon the court jurisdiction to revise the legislative judgment. The objection that in particular cases and classes of cases the statute may work injustice is one from which the wisest and most beneficent laws are not exempt, and one which lawmakers necessarily consider in weighing the advantages and disadvantages to the general public of any proposed measure. That is their chief and most important duty, and it is because it is so that it is believed that legislation is most safely entrusted to representative bodies whose members are elected from all classes of the community and from all regions of the state.

It is therefore recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

Hardinger v. Modern Brotherhood of America.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ELIZABETH HARDINGER, GUARDIAN, v. MODERN BROTHERHOOD OF AMERICA.*

FILED DECEMBER 21, 1904. No. 13,604.

1. **Insurance: BENEFIT CERTIFICATE: DEFENSE OF SUICIDE: BURDEN OF PROOF.** In an action upon a municipal benefit certificate, where the defense interposed is suicide, the burden is upon the defendant to establish such fact by a preponderance of the evidence.
2. **Cause of Death: QUESTION FOR JURY.** The question of the proximate cause of death in such an action is ordinarily a question of fact for the jury, and should not be taken from its determination unless the evidence is of such a nature as to clearly and certainly point to but one reasonable conclusion.
3. **Case Distinguished.** *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, examined and distinguished.
4. **Circumstantial Evidence.** When circumstantial evidence only is relied on to establish suicide, the defense fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another. *Modern Woodmen of America v. Kozak*, 63 Neb. 146, followed and approved.
5. **Cause of Death: QUESTION FOR JURY.** *Held*, That, under the facts and circumstances proved in this case, reasonable minds might differ as to whether deceased came to his death from a wound inflicted by his own hand with suicidal intent, and that such question should have been submitted to the jury under proper instructions.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Reversed*.

Warrington & Stewart and H. M. Sinclair, for plaintiff in error.

J. E. Markley, George C. Gillan and J. J. Sullivan, contra.

* Rehearing allowed. See opinion, p. 869, *post*.

OLDHAM, C.

The Modern Brotherhood of America, defendant in error in this case, is a fraternal beneficiary association doing business in this state. It issued a membership certificate to one George S. Hardinger upon his joining a lodge of this association at Overton, in Dawson county, Nebraska, on May 3, 1899, which provided, in substance, that in case of the death of said member while in good standing in the lodge the beneficiary therein named shall participate in the mortuary fund of said association to an amount not exceeding \$3,000 within 90 days after proof of such death. This certificate also contained the following proviso: "If the holder of this certificate shall die by his own hand, whether sane or insane, then this certificate shall be null and void and of no effect, and all moneys which shall have been paid and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited." Plaintiff in this action is the wife of George S. Hardinger and the guardian of the beneficiary named in the certificate.

On the 5th day of April, 1902, Hardinger was found on Wooded Island, in Jackson Park, in the city of Chicago, Illinois, dead or dying from a pistol shot wound in his head. Payment of benefits was refused by the association, and this action was brought in the district court for Dawson county by the guardian of the beneficiary to enforce payment thereof. The association for its defense alleged suicide. On the trial, when all the evidence had been taken, the trial court directed a verdict for the defendant. This was done upon the theory that there was but one reasonable conclusion to be drawn from the evidence, and that was that Hardinger took his own life. Judgment was rendered upon this verdict, from which error is prosecuted to this court by plaintiff.

The only assignment of error necessary to review is that the court erred in directing a verdict under the testimony. A careful review of the evidence contained in the bill of

exceptions shows that Wooded Island, the place of the tragedy, is located in Jackson Park, in the city of Chicago, and is one of the public parks in that city. This island is surrounded by a lagoon of water, and is a long narrow strip of land, containing about 20 acres. It is widest at the south end, and gradually tapers to a very narrow point at the north end of the island. There are two bridges, one at the north and one at the south end of the island, over which foot passengers enter. There is a fringe of willows and shrubbery about 25 yards in width around the shore of the entire tract. This shrubbery is quite dense in most places. The island is patrolled by park policemen, two of whom were on the island at the time the shot was fired that resulted in Hardinger's death. These police officers are the only witnesses that testified concerning the facts and circumstances surrounding the tragedy. Maher, one of these officers, who had been on the island from one o'clock in the afternoon until the time of Hardinger's death, which occurred at 7:10 P. M., testified as follows:

Q. Do you remember the occurrence of finding a man there dead that evening?

A. Yes.

Q. State what you first observed.

A. I was about 200 yards away. I heard the shot, and then officer Brown was coming along, and we thought it was somebody shooting at ducks in the lagoon at the time. Officer Brown said, "There is somebody shooting ducks on the lagoon." He went through the shrubbery and I went in the edge of the shrubbery, and there was an old log laid in the shrubbery, and we saw Hardinger's body lying alongside of the log. Brown was in the edge of the shrubbery at the time and I was right close to him, about a couple of yards.

Q. Go on and describe now just what you observed as to the position of the body.

A. He had evidently been sitting on this log, and he had a revolver at his right-hand side, and the bullet lodged

in the left eye. He was not quite dead at the time, so officer Brown stayed with him, and I went over to the Wooded Island police station, and they came with the wagon.

This witness further testified that the revolver along by the side of deceased had three empty chambers in it and three chambers with cartridges, one of which appeared to have been recently discharged. He also said that Hardinger was unconscious when they came to him; never spoke, and only lived a few minutes after their arrival. He further described the wound, saying the bullet had entered through the right temple near the right eye and penetrated to the left eye, where in his judgment it had lodged. He also testified that they could not see Hardinger from where they were standing when the shot was fired, even if he had been standing up, because there was an elevation or a kind of a hill between them and the place of the shooting. He also said deceased's hat was lying on the west side of the log and his body on the east side. The testimony of officer Brown was the same in all essential points as that of officer Maher, differing solely in his estimate of the distance between the deceased and the officers at the time the shot was fired, and also stating that the hat of deceased was on the log or the stump of the log by which he was lying, when found. This slight variance tends to throw no light on any material circumstances surrounding the death. When officer Maher notified the authorities, an ambulance wagon was sent to the island, and the body of deceased was taken to the morgue, where it was identified by his widow, plaintiff in this action, and turned over to her for burial. On Hardinger's body the officers found, among other things, a memorandum book giving his name and place of residence, the number of his watch, and the size of his hat, and containing the following entry: "There is nothing to tell, simply weary." This memorandum book was offered in evidence, and has the appearance of a book that had been carried for some time by the deceased. The entries in

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this book are conceded to have been in the handwriting of the deceased. There is nothing to indicate that any of the entries had been newly made, and there is no evidence that deceased had a pencil about him when found, although these entries were made with a lead pencil and are dim from apparent wear. As tending to show a probable motive for suicide, it was proved that Hardinger was formerly the cashier of a bank at Overton, Nebraska, and that he was short in his accounts, and had for this reason been dismissed from his position as cashier. This occurred nearly three years before his death, and there is no evidence that he was ever prosecuted or threatened with prosecution on account of his defalcation. There was also evidence introduced tending to show that Hardinger was overcome by escaping gas while alone at his home in June, 1901, and that for sometime thereafter he was quite sick and somewhat mentally deranged; that at one time shortly after the accident he disappeared from his home, and was gone from Monday until Tuesday night, and that when he returned he informed his wife that he was looking for his child which had been stolen; that as a matter of fact his child was at home all the time, and the idea of its having been stolen was a delusion. As against this evidence tending to show temporary insanity and delusions, the plaintiff, wife of deceased, testified that he had entirely recovered from the effect of his partial asphyxiation, and was in his normal condition, both of mind and body, for five or six months before his death; that their domestic life was peaceful and happy, that they resided in a suburb of Chicago called Englewood; that on the morning of his death, Hardinger left at his ordinary time intending to go to the city and return, as was his custom, at 5 o'clock for his dinner. This was the last time that anyone appears to have seen him until he was found by the policemen in a dying condition in the park.

This is all the material testimony in the record tending to throw light on the facts and circumstances surrounding Hardinger's death, and the question now arises, could

reasonable minds, in the light of this testimony, draw different conclusions as to whether the shot that ended Hardinger's life was fired with his own hand and with suicidal intent, or whether it might have been accidentally fired by him or someone else, or whether it might have been intentionally fired by someone else? If but one reasonable conclusion can be drawn, and that, that the shot was fired by deceased with suicidal intent, then the learned trial court was right in directing a verdict; but if the inferences either of an accidental shot by deceased or anyone else, or of an intentional shooting by someone else, can reasonably arise from this evidence, then the question as to whether the defense of suicide had been established by a preponderance of evidence should have been submitted to the jury for its determination under proper instructions. We think that the deductions that must follow from the testimony are that Hardinger came to his death from a gunshot wound, and that the shot was fired from the revolver that was found by the officers at his right hand. We think it is clear enough that the shot was fired from this revolver, because but one shot was fired, and the empty cartridge in this revolver appearing to have been recently discharged shows to a fair degree of certainty that the shot came from it. But whose revolver was this? Nobody who testified seems to know. There was no effort made to show that Hardinger owned a revolver or that he ever carried one, nor is there a scintilla of evidence in the record that before this occurrence he had ever threatened to commit suicide. Nobody saw him come on the island, although officer Maher had been there on his beat for six hours. Nobody seems to know whether he came alone or whether he came in the company of others. When his body was discovered it was getting dark, and the policemen made no effort to search the island to find whether anyone else was on there at that time. From the sight of the dying man and the revolver lying near at hand, the officers jumped at the conclusion that it was a case of suicide, and made no effort to investi-

gate any other theory which might have accounted for the death. There is no evidence even that the wound was powder-burned, as would have been likely had it been inflicted by deceased's own hand. While from this testimony we can readily see how a reasonable mind might infer that the death was self-inflicted and with suicidal intent, yet on the other hand we think it would not be an unwarranted and unreasonable conclusion from all the facts and circumstances in evidence that this wound might have been received at the hands of another, either through accident or intention. When the shot was fired the officers who were north of the deceased could not have seen him even if he had been standing erect, as Maher testified, because of an elevation or "kind of hill" between them. Now, if they could not have seen Hardinger, they could not have seen someone else standing near him, and if someone did stand near him and shoot him, either intentionally or accidentally, such person could have dropped the revolver where it was found, skirted the underbrush down to the south bridge of the island, and have escaped in the growing darkness without observation. While the memorandum in the book found on his person, and the incident of his partial asphyxiation by gas, might each tend to suggest the probability of suicide, yet neither nor both of these incidents conclusively show a suicidal intent, and the business failure of the deceased is so remote from the occurrence as to throw little light upon it.

It is urged by counsel for defendant in error that this case falls clearly within the rule recently announced by this court in *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5. In this case it was held that the facts and circumstances surrounding the death of Hruby so clearly and unmistakably pointed to suicide that no other reasonable conclusion could be drawn from them, and therefore that, as a question of law, the court should have directed a verdict in favor of the defendant. In our judgment there is a well defined difference between the facts and circumstances surrounding Hruby's death and

those surrounding the death in the case at bar. In the *Hruby* case the evidence shows that he was strongly attached, either by ties of kindred and long association or by the more tender ties that bind the different sexes together, to a young lady, Mary Vlach, who was the beneficiary named in his certificate; that while working in South Omaha he received a telegram announcing the sudden death of Mary Vlach; that on receipt of this message he came to the home of the deceased in Cuming county; that when informed of the death of the young lady he was greatly depressed in spirit, and that his depression continued or increased when informed that she had died by her own hand. While the mother of the deceased young lady was preparing a meal for Hruby and the members of the family, he went into a bedroom and sat down on a bed adjoining the one on which the young lady's body was lying. After this he was seen by the mother walking the floor in the kitchen adjoining this room. In a few minutes the mother heard a shot, ran into the room, and saw Hruby standing in front of the dead girl with a revolver in his right hand and a bullet wound in his head; he turned partially around, reeled and fell face downward, and expired almost instantly. In this case, as said by HOLCOMB, J., "the question for consideration was narrowed to the proposition, solely, as to whether the death was accidental or the result of an intentional taking of his own life." In other words, it was clearly and unmistakably proved that Hruby came to his death from a pistol-shot wound fired by his own hand, for there was no one else in the room alive to fire the shot. So that the only alternatives were either accidental or intentional shooting by the deceased, and the conduct of the deceased and the circumstances surrounding the occurrence so plainly indicated suicide that it was held that no other reasonable inference could be drawn. Now in the case at bar there is no evidence that clearly and unmistakably shows that Hardinger shot himself, nor do all the facts and circumstances relied upon to show a suicidal intent

point to this motive with such unerring certainty as to exclude every other reasonable hypothesis. In *Modern Woodmen Accident Ass'n v. Shryock*, 54 Neb. 250, this court said:

"In our opinion the question of what is the proximate cause of death in an action like that now under consideration, is a question of fact to be determined by the jury from a consideration of the evidence and the determination of this question should not be withdrawn from the jury unless, from an admitted state of facts, all reasonable men fairly exercising their judgments must draw the same conclusion."

The legal presumption is always against suicide, and consequently the burden of proving self-destruction is upon the party pleading it. *Modern Woodmen of America v. Kozak*, 63 Neb. 146; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661; *Schultz v. Insurance Co.*, 40 Ohio St. 217.

In *Modern Woodmen of America v. Kozak*, *supra*, it was said by this court:

"In the case of *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, it is said: 'In such action, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defense fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.' *Travelers Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; *Jones v. United States Mutual Accident Ass'n*, 92 Ia. 652. In the last cited case it is said: 'Where, in an action on an accident policy, it appears that the insured was killed by a pistol shot, the burden is on the insurer to show that the shot was not accidental.'"

We think that under the facts proved in this case reasonable minds might draw different conclusions as to whether the death of Hardinger was self-inflicted with suicidal intent or whether it resulted from other causes.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings in conformity with this opinion.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED.

The following opinion on rehearing was filed April 5, 1905. *Judgment of reversal vacated. Judgment of district court affirmed:*

1. **Insurance: ACTION ON CERTIFICATE: BURDEN OF PROOF.** In an action on a beneficiary certificate, or a life insurance policy, where the company or association alleges suicide as a defense, the burden of proof is on the defendant to establish that fact by a preponderance of the evidence.
2. **Presumption: EVIDENCE.** The presumption in such a case that a sane person will not destroy his own life is a rebuttable one and must yield to proof of physical facts clearly inconsistent with it.
3. ———: ———. Competent proof of facts and circumstances surrounding and connected with the death of the assured which point clearly and unmistakably to the conclusion that he took his own life, and which exclude all reasonable probability of death by murder or accident, is sufficient to overcome and destroy the presumption above mentioned, and establish, at least *prima facie*, the defense of suicide.
4. **Directing Verdict.** If nothing is shown by either party inconsistent with the proof of such facts, it is the duty of the trial court to direct the jury to return a verdict for the defendant. *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5, followed.

BARNES, J.

This case is before us a second time for our consideration. In an opinion, *ante*, p. 860, written by Mr. Commissioner OLDSHAM, and approved by the court, it was held that the trial court erred in directing a verdict for the defendant below. A rehearing was allowed, the case has

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been reargued, and the same question is again presented for our consideration. Our former opinion contains a full and complete statement of the pleadings, from which it appears that the defense of suicide was the only issue tendered for trial in the court below. On that question the burden of proof was on the defendant. *Modern Woodmen of America v. Kozak*, 63 Neb. 146; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, 32 L. ed. 308; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. Rep. 676. Examining the record, in view of this rule, we find that it discloses that one George S. Hardinger joined the association on the 8th day of April, 1899, and that at a later date a beneficiary certificate was issued to him in favor of his minor son; that he was found dead, or in a dying condition, on Wooded Island, in Jackson Park, in the city of Chicago, on the evening of April 5, 1902. On the trial in the district court it was shown by the association, in support of its defense, that the deceased was in charge of a bank in Overton, Nebraska, from 1895 to 1899; that early in the latter year he became a defaulter for something like \$30,000, and was discharged from his position for that reason; that he never made his shortage good, but was not prosecuted criminally, nor was he unduly pressed for the payment of his shortage, because of his relationship to the owners of the bank; that later on in that year he moved to Chicago, rented rooms in a flat at number 6,448 Armour Avenue, in Englewood, a suburb of that city, and established his residence there; that after he lost his position with the bank he was despondent and troubled about his business matters; that in June, 1901, while his wife was visiting her parents at Tinley Park, about 25 miles from Chicago, and while he was alone in his house, he was overcome by escaping gas. He was found by the postman, who called a physician, and he was resuscitated. He was ill from the effects of his asphyxiation for a considerable time; was treated by one Dr. Lovewell, and it appears he recovered from that illness in about six weeks. When asked by the doctor on one oc-

casion as to how the matter occurred, he refused to make any explanation of it; that when the same question was asked him by his wife, he informed her he did not know anything about it. From that time until his death it appears that he was ill at times; that in August, 1901, he was troubled with hallucinations; and believed that his child had been taken away. He thereupon left home in search of it, being gone about two days. It was also shown that it was his habit to go to the city every morning to amuse himself, and remain there until time for the evening meal; that he was without employment, but had, in a great measure, recovered his physical health at the time of his death. His condition can best be explained by quoting the evidence of his wife:

Q. After he was sick in June he never went to work again as bookkeeper, did he?

A. He did not.

Q. And after he was sick in June he was confined to the house for some time, wasn't he?

A. A few days.

Q. And he was under the care of the doctor for some time, was he not?

A. In June?

Q. Yes, and until along in October, he was still doctoring with Dr. Lovewell, wasn't he?

A. I don't know; I don't remember.

Q. And in August he was under the delusion that his son was stolen?

A. At that time, yes.

Q. And from that time on did he go down town every day?

A. He was in the house about a week until he was well again, and he went down town every day.

Q. That was after he was wandering around?

A. Yes.

Q. Then he would go down town?

A. Yes.

Q. Do you know what he went down for?

A. Just went down for pastime.

Q. Went down for pastime?

A. That's what he said.

Q. Now you say after that time in August, when he was away a day and a half, after he got well he was all right mentally. Do you mean that?

A. He was all right, but he was sick.

Q. Well mentally?

A. Well, I think he was at times.

Q. You think he was at times?

A. Most of the time.

Q. A part of the time he was mentally unbalanced?

A. Well, I wouldn't call it unbalanced.

Q. Under depression?

A. Well, he was dizzy.

Q. And along toward evening he would have fits of melancholia, or depression?

A. No, he was the same all the time, but suffered from insomnia; couldn't sleep.

It further appears that on the morning of April 5, 1902, Hardinger left his house and went to the city as usual; that at about seven o'clock that evening two policemen, who were on duty on what is called Wooded Island, in Jackson Park, heard a shot fired at the distance of from 100 to 200 yards from them, and hurried immediately to the place from whence the sound came to ascertain its cause. They found Hardinger lying on his back by the side of a log; his blood and brain oozing from a wound inflicted by a pistol shot on the right temple at the edge of the hair line in front of the ear; the wound was blackened around its edge where the bullet entered; a revolver lay at his right hand with three cartridges in its chamber, one of which had been recently discharged, and the smell of powder smoke still lingered about the place. A careful examination disclosed no footprints or traces of the presence of any other human being near the body, or in that immediate vicinity; his clothing was undisturbed; his watch, ring, purse and other effects were found on

his person, and in his vest pocket was a memorandum book in which his name and address were written. This memorandum book had written in pencil with his own hand upon the first leaf or page, lengthwise thereof, the words: "There is nothing to tell; simply weary." The book contained no other writing of any kind, and Hardinger died without regaining consciousness. The testimony also showed that no other person was present on that part of the island; that if there had been any other person in that vicinity the officers could have seen him.

With the foregoing facts established by the evidence the district court, on the motion of the defendant association, directed the jury to return a verdict in its favor, and the only question for our consideration is, was such direction error? It may be stated at the outset that self-destruction is not to be presumed. In other words, the presumption arising from the general conduct of mankind is that a sane person will not destroy his own life. But this is a rebuttable presumption, and easily yields to physical facts clearly inconsistent with it. It is not proof, nor does it stand in the way of proof, and when sufficient evidence is introduced to overcome this legal presumption it disappears. On mature reflection we are of unanimous opinion that the proof in this case clearly overthrows the presumption above mentioned, and excludes all probability of death by accident or by the hand of another. The undisputed facts and circumstances in this case lead naturally and rationally to but one inference, and that is that George S. Hardinger shot himself intentionally. It seems to us that no other fair, just or reasonable conclusion is possible. When the facts naturally and reasonably lead the mind to but one conclusion, there must be something in the circumstances, something somewhere in the evidence, to suggest murder or accident. No circumstances can be pointed out consistent with the use of the weapon, for some unexplainable purpose, from which accidental shooting probably resulted. To indulge in such inference is to engage in fanciful conjecture. The basis of

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such a conclusion is not to be found in the evidence, but if it exists at all it is altogether outside of it, and is a guess, a surmise or a conjecture. No fact or circumstance can be pointed out in the evidence which indicates that the use made of the revolver by Hardinger was accidental; and there is nothing in the record from which a presumption of death by murder can be justified. There is no conflict in the evidence. It all points unmistakably and clearly to death by suicide. Any other conclusion would outrage all reason. And had the question been left to the jury, and had that body found otherwise, its finding would have been set aside as against the evidence. A verdict of the jury for the plaintiff in this case would have had no basis except mere conjecture. In such a case it is the duty of the court to treat the matter in question as one of law, and direct the proper verdict. *Sovereign Camp of the Woodmen of the World v. Hruby*, 70 Neb. 5.

The rule is well established that, if, from the undisputed facts, different minds may not honestly reach different conclusions without reasoning irrationally, it is not error for the trial court to withdraw the case from the consideration of the jury, and direct a verdict consistent with the facts. *Knapp v. Jones*, 50 Neb. 490; *Shiverick v. Gunning Co.*, 58 Neb. 29. In this case different minds cannot arrive at different conclusions. The evidence points clearly and unequivocally to suicide. In order to reach any other conclusion one must go outside of the record and resort to mere speculation or conjecture. Our former opinion followed *Modern Woodmen of America v. Kozak*, 63 Neb. 146, which counsel for the plaintiff insist is in point and authority for our present decision. An examination of that case shows that nearly all the facts and circumstances tended strongly to prove that Kozak came to his death by his own hand. It was shown, however, beyond question, that the bullet which was taken from the wound in Kozak's head, and which evidently caused his death, was several sizes smaller than the caliber of the revolver which was found near his body, and could not have been fired

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from that weapon. If such proof had been made in the case at bar, or if there was any competent evidence to dispute the testimony offered by the defendant in proof of its defense of suicide, an entirely different question would have been presented. In such a case the court should submit the question of fact to the jury; while in the case at bar there was no dispute as to the facts, and the whole matter was properly treated as a question of law.

We are now of opinion that the district court did not err in directing the jury to return a verdict for the defendant, and, for that reason, our former judgment is vacated and the judgment of the district court is in all things

AFFIRMED.

MICHAEL FARRELL, APPELLANT, V. AUSTIN BOUCK ET AL.,
APPELLEES.

FILED DECEMBER 21, 1904. No. 13,637.

1. Equity. One who falls through culpable inertness to make inquiry when it is his duty to inquire, and by reason of such failure loses a valuable right, is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*, 60 Neb. 771, followed and approved.
2. Judgment: REVIEW: LAW OF THE CASE. Judgment of the district court examined, and held to be in conformity with the "rule of the law of the case" as established on its former hearing in this court.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McCarthy, for appellant.

William P. Warner, contra.

OLDHAM, C.

This was a suit in equity instituted by plaintiff in the district court for Dixon county for the purpose of rein-

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stating and enforcing in favor of plaintiff, Michael Farrell, a real estate mortgage, which it was alleged had been canceled and released of record through a mistake of fact. The original action was begun in the year 1894, and has been twice reviewed by this court. At the first hearing of the cause in the district court, a judgment was rendered in favor of plaintiff for the relief prayed for in his petition. This judgment was reviewed on appeal in this court in the case of *Farrell v. Bouck*, 60 Neb. 771, and the judgment of the district court was reversed and the cause remanded, because "the cause of action pleaded was not, on the trial, established by the proof." On a rehearing this opinion was adhered to in an opinion by NORVAL, C. J. *Farrell v. Bouck*, 61 Neb. 874. During the pendency of the action on the first appeal, defendant Ryan departed this life, and the cause was revived against his personal representative. When a new trial was had in conformity with the judgment of this court on the first appeal, plaintiff amended his petition, charging in addition to the false representations of defendant Ryan the further allegation that he had been deceived and misled by the representations of defendant Bouck into releasing the mortgage, without making a full examination of the records of Dixon county. On issues joined on this amended petition, the court found for the defendants, and plaintiff brings the cause here for review on appeal.

The material facts underlying the controversy are that in May, 1894, plaintiff Farrell and defendant Ryan signed a note, as sureties, for defendant Bouck, who was the father-in-law of plaintiff Farrell. Defendant Ryan had a mortgage, executed by defendant Bouck on a lot and small store-house in the village of Allen, Dixon county, assigned to him for indemnification of his suretyship on the note. At or near the time this note matured, plaintiff Farrell agreed with his father-in-law, defendant Bouck, that he would pay off and satisfy the note, if defendant Bouck would deed him the village property covered by Ryan's mortgage. This Bouck agreed to do. Farrell no-

tified his co-surety Ryan, who assigned him the indemnifying mortgage. After procuring the assignment of the mortgage, plaintiff took a warranty deed to the premises, duly executed by defendant Bouck and wife, and paid the note. In a short time after this he went down to Ponca, the county seat of Dixon county, and asked the county clerk, who was *ex officio* register of deeds of the county, to make an examination of the title of the village property described in his deed. The clerk did this, and found the property clear of all liens, so far as the records of his office disclosed, except the mortgage which had been assigned to plaintiff. Plaintiff then went to the county treasurer and had an examination made of the tax liens. He then released his mortgage and filed his deed for record, without making any examination for judgment liens in the office of the clerk of the district court of the county. It afterwards developed that, at the time the mortgage was released and the deed filed for record, there was a judgment lien in favor of defendant Ryan and against defendant Bouck on record in the office of the clerk of the district court. It was for the purpose of having the mortgage reinstated, and the release canceled, and this judgment lien in favor of defendant Ryan declared a subsequent and junior incumbrance, that this action was instituted. The only material difference in the testimony adduced at the last hearing and that reviewed on the former appeal is that, at the last hearing of the cause, the court excluded all evidence offered tending to show that defendant Ryan had stated to plaintiff that he had no other lien against the land of defendant Bouck, except the mortgage which he transferred to plaintiff. It was for lack of this testimony and a finding thereon that the cause was reversed at the first hearing; and the evidence offered on this question at the last hearing was excluded by the trial court on the ground that it was a conversation with a dead man. On appeal we cannot examine any errors of the trial court in the admission or exclusion of testimony, but rather try the case *de novo* on the testimony admitted. Under this view,

we cannot see how we can avoid the rule of the law of the case as determined between the parties on the first hearing in this court as now controlling this action. It is true that at the last trial plaintiff, under the allegation of his amended petition, introduced evidence tending to show that defendant Bouck told him, plaintiff, when he delivered the deed to him, that there was no other liens that he knew of against the property, except the mortgage; but the evidence shows that plaintiff did not rely on this representation alone; but that, on the advice of one Kearney, he went to the county seat of the county to have an examination made for liens against the property, and that he did make a partial but incomplete examination of the records for such information. At the former hearing (61 Neb. 874), we said: "One who, through culpable inertness, fails to make inquiry when it is his duty to do so, is not in a position to have a release of a mortgage canceled on the ground of mistake." We are therefore of the opinion that the judgment of the trial court on the evidence admitted is in strict conformity with the law of this case as established on the first hearing in this court; and we recommend that it be adhered to and the judgment of the trial court affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the trial court is

AFFIRMED.

HUMPHREY HARDWARE COMPANY V. CHARLES M. HERRICK.*

FILED DECEMBER 21, 1904. No. 13,673.

1. **Promissory Note: ALTERATION.** The alteration of a negotiable promissory note, after delivery, by filling in blanks left therein, where there is nothing on the face of the note to indicate such

* Rehearing denied. See opinion, p. 881, *post*.

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alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity, and without notice of such change.

2. **Negligence: Equity.** If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss. *Yocum v. Smith*, 63 Ill. 321, followed and approved.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. O. Whedon, for plaintiff in error.

Wilson & Brown, contra.

OLDHAM, C.

This was a suit by an innocent holder, for value, of a promissory note executed by the Humphrey Hardware Company, a copartnership, for \$2,500, due 90 days after date, and bearing interest at the rate of 10 per cent. The defense interposed was that the note had been fraudulently altered by the payee by inserting in the blank spaces the rate and date of interest, and place of payment. It was admitted that the note was properly executed and delivered by the defendant, Humphrey Hardware Company, to Francis B. Chapman, the payee named therein. It was admitted that the note was written by the payee, and that the blanks were also filled by him, so that the note stood fair on its face at the time it was purchased by the plaintiff in the court below. There was a direct conflict in the testimony of Chapman, the payee, and Wheeler, the secretary and treasurer of the defendant company, as to whether the blanks in the note were filled before or after the delivery of the note to the payee. It was clearly established, however, that when the note was negotiated the blanks had all been filled, and that the written portion of the note and the blanks for rate of interest, date of interest, and place of payment were all in the same handwriting. On issues thus joined, there was a trial to a jury in the court below,

a verdict for plaintiff, and defendant brings error to this court.

The facts clearly proved surrounding the execution and delivery of the note were that Chapman, the payee named in the note, was the business manager of defendant company; that the company was in need of money, and Chapman offered to advance \$2,500 for the use of the company if defendant would give him a note for such sum. The company accepted the proposition, and directed the execution of a note, which was accordingly done by the secretary and treasurer of the company. That on the execution and delivery of the note the payee, Chapman, took the note to the Columbia National Bank and negotiated it as collateral security to his own note for the purpose of procuring the money, which was accordingly done, and the money was thereupon turned over to the defendant company. The only conflict in the testimony is as to when the three blanks in the note were filled, whether before its delivery to Chapman or after; however, there is no conflict in the testimony, which clearly establishes that the blanks had all been filled before the note was negotiated. The trial court, after allowing the witnesses to go fully into the entire transaction leading up to the execution and delivery of the note, submitted the cause to the jury on an instruction which told it, in substance, that, if the jurors believed from the evidence that the alteration in the rate and the time of drawing interest was made after the delivery of the note by the defendant company to the payee, without the knowledge or consent of the defendant, then they should find for the defendant. This instruction, we think, was all if not more than defendant was entitled to under the evidence contained in the record.

It seems to be well supported by the authorities that the alteration of a promissory note, after delivery, by filling the blanks left therein, where there is nothing on the face of the note to suggest an alteration, will not invalidate the note in the hands of a *bona fide* endorsee, for value, before maturity, and without notice of such alteration. The rea-

son of this rule is that, where the maker of a note signs it and delivers it to the payee, with blank spaces in the note for the rate of interest, the time of maturity, or the place of payment, he will, in a contest with an innocent purchaser of the paper, before maturity, and for value, be held to have authorized the payee to fill in the blank spaces, unless the paper on its face bears evidence of mutilation or alteration. Or, as was said by the supreme court of Illinois, in the case of *Yocum v. Smith*, 63 Ill. 321:

"If the note had been altered, the maker has acted with too gross carelessness to be entitled to protection. The purchaser is entirely innocent, and not even a suspicion of his good faith is created—nothing to show that he had any notice of anything wrong. The maker placed it in the power of another to do an injury, and if any loss results, he must suffer who is the cause of it. If the negligence of one influences and induces an act whereby an innocent man is injured, the culpable party must sustain the loss."

Under this view of the case, no other judgment than that rendered in the court below could have been sustained either under the law, the evidence or the conscience of the transaction, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed March 23, 1905. *Motion overruled:*

PER CURIAM:

Conceding all that is claimed by the plaintiff in error with reference to the alleged alteration of the instrument sued on, it would not be a material alteration in the sense

that the instrument would be void in the hands of a good-faith purchaser, for value, before maturity. The alleged alteration consisted only in filling the blanks in the note sued on by inserting therein the rate of interest, the date from which interest was to begin to run, and the place of payment. The note was written by the payee, and the blanks filled at the time or immediately after its execution, and before its negotiation. The right of the holder to fill these blanks is under an implied authority given by the maker, and, when the note has passed into the hands of an innocent third party, this implication of authority becomes conclusive, and the instrument is a valid and enforceable one against the maker. This rule is abundantly supported by the authorities collated in a monographic note to *Burgess & Co. v. Blake*, 128 Ala. 105, 86 Am. St. Rep., note 9, p. 107.

In *Hurlbut v. Hall*, 39 Neb. 889, it is not made clearly to appear whether the insertion of the rate of interest was in a blank left for that purpose when the note was delivered, or whether it was by an interlineation which would be apparent upon the face of the note. If the note is complete upon its face when it is delivered, and material matters are inserted in the note thereafter, such additions to the note would constitute an alteration, although it was not apparent from an inspection of the note itself that the additions thereto had been made after the delivery of the note.

The motion for a rehearing is denied.

MOTION OVERRULED.

GEORGE W. CLARK V. INTERSTATE INDEPENDENT TELEPHONE COMPANY.

FILED DECEMBER 21, 1904. No. 13,680.

1. **Cities: FRANCHISE: INJUNCTION.** A taxpayer of a city cannot maintain a suit to prevent the city from granting a franchise to a telephone company, unless the franchise constitutes such a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby.
2. **Franchise: FRAUD: REMEDY.** The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by *quo warranto* at the suit of the state, and not by an equitable action at the suit of private parties.

ERROR to the district court for Douglas county: **GEORGE A. DAY, JUDGE.** *Affirmed.*

W. W. Morsman, for plaintiff in error.

W. C. Lambert and *T. J. Mahoney*, *contra.*

OLDHAM, C.

Plaintiff as a taxpayer in the city of South Omaha brought this action for the purpose of having a franchise ordinance granted to the defendant by the mayor and council of the city of South Omaha declared void, and to have defendant restrained from proceeding under its franchise and occupying the public streets and thoroughfares of the city in the construction and installation of its telephone system. The petition is carefully drawn and quite lengthy, setting up numerous alleged defects in the proceedings of the mayor and council, both in the passage of the ordinance, and in the notice and conduct of a special election called for the purpose of submitting such proposition to the voters of the city. Defendant interposed a demurrer to plaintiff's petition, which was sustained by the trial court; and plaintiff refusing to further plead, his petition was dismissed, and he brings error to this court.

There is no claim in the petition that any of the lines of the defendant company, or any poles erected in the construction of its lines, pass over, upon or near any streets upon which plaintiff's property abuts; or, in other words, there is no claim of any special injury to plaintiff or his property, which would not be shared by every other taxpayer of the city; nor is it alleged that any tax has been levied or any contract entered into by the city with the defendant company which would entail any liability against the taxpayers of the city. On the contrary, it clearly appears from the allegations of the petition that an annuity of \$100 a year for the first five years of the franchise, and of \$200 a year for the remaining five years, was exacted by the city council from the defendant company as a condition of the granting of the franchise for a period of 10 years. The ordinance alleged against in the petition makes no attempt to grant an exclusive franchise for the purposes therein specified to the defendant company, so that, if plaintiff has any right simply as a taxpayer to maintain this cause of action, it must be founded either on the proposition that the mayor and council of the city are without any original right or authority to grant the franchise under the charter and ordinances of the city, and that plaintiff and those for whom he sues will be injured by such grant; or that the franchise so granted is a property right held in trust for all the taxpayers of the city, which has been illegally dissipated by the ordinance alleged against. On the first proposition it is conceded and plainly made to appear by the charter and ordinances of the city that the mayor and council, under proper proceedings, had and have the right to grant the franchise. It is claimed, however, by the learned counsel for plaintiff in error, that the franchise right granted by the ordinances is the property of the city, which has been illegally disposed of by the ordinance alleged against. By the law governing the city of South Omaha (Laws, 1901, ch. 17, sec. 172), it is provided as follows:

"No new franchise shall hereafter be granted or any

extension or franchises heretofore granted, be lawful, unless an annuity to the city be provided, based upon either a fixed reasonable amount per year or a percentage of the gross earnings of such franchise."

Now, it is clear from the language of this statute that a sound discretion was intended to be reposed in the mayor and council of the city in determining the amount of the annuity to be required, and that the only limits bounding this discretion are that it must be "reasonable." There is no contention that the amount fixed for the annuity in the ordinance alleged against is unreasonable, or that it is a less amount than should have been exacted; but the contention is that, as the ordinance and the preliminary proceedings leading up to its adoption and passage were irregular and illegal, it stands as though no annuity whatever had been required. We do not think this position tenable, because it seems clear that the defendant company cannot accept a franchise from the city council providing for the payment of this annuity, and enjoy the benefits and immunities of the franchise, and then deny its liability for the payment of the annuity reserved, even if there had been irregularities in the passage of the ordinance. Consequently, plaintiff as a taxpayer is not threatened with additional liabilities by the passage of the ordinance, but, on the contrary, he will be aided by the amount of the annuity, which must be paid annually as a condition of the exercise of the franchise. Again, the franchise, as before pointed out, is not exclusive. Consequently, the storage basin of the city's franchise rights has not been lowered by this diversion.

It is true that this court has extended to the limits the right conferred upon a taxpayer on his own behalf to enjoin municipal or other public officers from squandering public funds, or entering into unauthorized and illegal contracts, which would by their nature increase the burden of taxation. We have also in proper cases permitted taxpayers to recover public moneys illegally squandered and dissipated by the wrongful acts of public officials; but all

these cases rest on the sound principle that each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation.

It seems to be well established, both on principle and by the authorities, that a private individual suing simply as a taxpayer must show something more than a mere speculative or theoretical wrong, which has resulted or will result from a mere illegal act of a city council, to entitle him to equitable relief. It is not enough that the act alleged against is simply illegal, but it must also appear that the illegal act will result in the invasion or destruction of a distinctive right belonging to the party maintaining the action, or to the body of citizens for whom he sues. Injunction by a taxpayer is not the remedy to test the usurpation of a franchise by a corporation. In *Linden Land Co. v. Milwaukee Electric R. & L. Co.*, 107 Wis. 493, it was held in a most careful and exhaustive opinion, by Winslow, J., that a taxpayer of a city cannot maintain a suit to prevent the city from granting a franchise to a street railway, unless the franchise constitutes such a wrongful squandering or surrendering of the money or property of the city that taxation will be increased thereby. Again, in *Stedman v. City of Berlin*, 97 Wis. 505, 73 N. W. 57, it was held:

"The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by *quo warranto* or *scire facias* at the suit of the state, and not by an equitable action at the suit of private parties."

It seems to us that, even if, as contended by plaintiff, the ordinance granting the franchise was illegal and improperly enacted, the proper remedy to determine this question is by the high prerogative writ of *quo warranto*, and not by an injunction at the suit of a private citizen and taxpayer to restrain the exercise of the franchise. 1 *Clark and Marshall, Private Corporations*, 207; *People v. Utica Ins. Co.*, 8 Am. Dec. 243; 2 *Dillon, Municipal Cor-*

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porations (4th ed.), sec. 844. We therefore conclude that the learned trial judge was right in sustaining the demurrer to plaintiff's petition, and we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE P. COLLYER V. LATHAM DAVIS.

FILED DECEMBER 21, 1904. No. 13,684.

1. **Sale of Real Estate: STATUTE OF FRAUDS.** It is not necessary that a memorandum, signed by the grantor, sufficient to evidence a sale of real estate, should all be contained in a single letter or communication; but if the contract can be ascertained from the entire correspondence between the parties, or from two or more separate papers referring manifestly to the same subject, without the aid of oral evidence, it will be a sufficient memorandum within the meaning of the statute of frauds.
2. **Memorandum.** While an undelivered deed properly executed and placed in the hands of vendor's agent is not, standing alone, a sufficient written memorandum to evidence a contract of sale of real estate, yet it does not follow that such undelivered deed, submitted to the grantee for inspection, may not be considered for the purpose of aiding an imperfect description in another written memorandum signed by the vendor.
3. **Evidence examined, and held** to show a sufficient memorandum in writing signed by the vendor to take a contract of sale of real estate without the ban of the statute of frauds.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Reversed.*

Smyth & Smith, for plaintiff in error.

I. E. Congdon, *contra*.

OLDHAM, C.

This was an action brought by plaintiff, George P. Collyer, in the district court for Douglas county, Nebraska, against defendant, Latham Davis, for damages for the alleged breach of a contract for the sale and purchase of a tract of land called "The Glebe," situated in the state of Virginia. After the evidence was presented, defendant moved the court to direct the jury to return a verdict in his favor, on the theory that the evidence failed to show that plaintiff, Collyer, as vendor, had ever made a note or memorandum in writing which would evidence the alleged contract of sale. The court accordingly directed a verdict as requested by defendant. A motion for a new trial was filed by plaintiff and overruled, and judgment was entered upon the verdict, and to reverse this judgment plaintiff brings error to this court.

The only question to be determined is as to whether the evidence introduced by plaintiff in the court below is sufficient to show a memorandum in writing signed by the vendor of the lands, or his agents authorized by him in writing to subscribe to such agreement. A contract for the sale of lands is governed by the provisions of sections 5 and 25, chapter 32, Compiled Statutes, 1903 (Annotated Statutes, 5954, 5974), which are as follows:

"Sec. 5. Every contract for the leasing for a longer period than one year * * * or for the sale of any lands, or any interest in lands shall be void unless the contract, or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

"Sec. 25. Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing."

The land which formed the subject of this alleged contract is, as above stated, located in Westmoreland county, Virginia. The plaintiff is a resident of Virginia, and the

defendant, at the time of the negotiations, was a resident of the state of Nebraska. In April, 1903, defendant Davis, accompanied by one of his employees named McDermott, went to Virginia for the purpose of purchasing land. At the village of Hague, in the state of Virginia, they met Messrs. Murphy and Mayo, who were real estate agents of the village and county. The lands in dispute had been placed in charge of these agents by plaintiff Collyer, under a contract in writing, signed and sealed by the plaintiff, which, after fixing the terms and price of the land, contained the following condition: "I hereby authorize Murphy and Mayo to sell my tract of land in Westmoreland county, containing 400 acres, and I agree to pay them 10 per cent. commission if they sell or are the means of selling or exchanging it. * * * If an imperfect title prevents the consummation of the sale I agree to pay the commission." The terms named in the contract were \$8,000, payable one-fourth down and the remainder in one, two and three years. After defendant Davis and his employee had examined the land, according to plaintiff's testimony, Davis offered \$5,500 for the land, one-third down, one-third in one year and one-third in two years. This offer was made on April 17, 1903, and was communicated to plaintiff by his agents Murphy & Mayo in the following telegram:

"George P. Collyer, Stanton, Va.

"Have offer \$5,500 for 'Glebe.' One-third cash, balance in one and two years. Answer at once.

"(Sig.) MURPHY & MAYO."

On the following day plaintiff wired Murphy & Mayo as follows:

"Murphy & Mayo, Hague, Va.

"Will take \$5,000 net to me.

"(Sig.) GEORGE P. COLLYER."

On the same day Collyer wrote to Murphy & Mayo as follows:

"Murphy & Mayo, Hague, Va.

"GENTLEMEN: Your telegram of this date, stating that you had offer of \$5,500 for 'Glebe,' just received. I wired that I will take \$5,000 net to myself, leaving \$500 for your commission. I am not anxious to sell the place, because I bought it for a future home and also believe I can get more money for it in a year or two. So it makes very little difference to me whether you close out the place at \$5,500 or not.

"Thanking you for your kindness,

"Yours very truly,

GEORGE P. COLLYER."

On receipt of this communication Murphy & Mayo, on the 19th of April, wrote to plaintiff Collyer, that they had completed the sale with the defendant Davis, who had just left for the state of Nebraska, leaving Mr. McDermott, according to plaintiff's testimony, to complete the arrangements for the transfer of the place, and take possession for him as soon as the papers have been exchanged and the terms of the contract completed. At the same time Murphy & Mayo wrote Collyer this last letter, they wired to defendant Davis, at Omaha, as follows:

"Latham Davis, Omaha, Neb.

"Mr. Collyer accepted your offer. I am glad to say you can send check to McDermott. We will search title and make papers.

MURPHY & MAYO."

On the 30th of April, defendant Davis wrote to Murphy & Mayo as follows:

"Have been up to my ranch in Boone county and on my return yesterday found yours of the 19th inst. Please have your bankers in Washington or Alexandria forward abstract, deed and mortgage of the 400 acres Glebe tract to the First National Bank, or their correspondent in Omaha, allowing bank here to have attorney investigate papers before payment of money and delivery of notes," etc. At the bottom of this letter was marked "Over" and the following memorandum was placed on the back of the

letter: "Cash \$1,833.34, note one year \$1,833.33, note two years \$1,833.33, total \$5,500."

On May 8, Murphy & Mayo wired defendant at Omaha:

"Latham Davis, Omaha, Neb.

"Have closed deal with Collyer according to terms of your letter of April 30. MURPHY & MAYO."

Following all this correspondence Murphy & Mayo procured a deed to the premises, duly executed and acknowledged by the plaintiff, and also had drawn up two notes, according to the terms of the agreement, and a sight draft of five days for the one-third cash payment, and inclosed these papers with a memorandum of the title of the land, and transmitted them through the bank at Alexandria, Virginia, to the First National Bank of Omaha, as directed by defendant Davis, for his inspection, and with directions that the deed should be delivered on payment of the draft and the execution of the notes and deed of trust, and that the notes and deed of trust should be sent back to the bank at Alexandria, Virginia. When the deed, draft, notes and mortgage were received at the First National Bank of Omaha, certain objections were interposed to the chain of title and to the form of security by defendant's attorney, and the objections were sent back through the mail to Murphy & Mayo. Murphy & Mayo then wrote, practically offering to comply with all the requirements demanded. But this offer was refused by defendant, who declined any further negotiations with reference to the property.

It is conceded that, unless the contract falls within the ban of the statute of frauds, the question as to whether plaintiff had complied with the conditions of the contract or not was one of fact, which under plaintiff's testimony should have been submitted to a jury. So that the only question for us to determine is whether or not the correspondence above set out constitutes a sufficient memorandum in writing, signed by plaintiff, or an agent authorized

under the terms of the statute to subscribe to such memorandum for him. It is conceded that Murphy & Mayo under the written contract with plaintiff had, when the negotiations were begun, proper and full authority to contract for the sale of the land in dispute on the terms specified in their agreement with the plaintiff. It is also apparent that they had by the instrument then in their possession no other authority, so that if, when the offer of \$5,500 was made, they had entered into a contract with the defendant for a sale of the premises on the offer then made, it would have been unauthorized, and a memorandum signed by them would have contained no probative force under the statute of frauds. But when they wired the terms of this offer to their principal, he had a right to change the terms of the written contract, and this, we think, he did by his telegram and the letter explanatory of the telegram which followed it. There is no contention as to the genuineness of any letter or telegram offered by the plaintiff, and they are connected in such a manner, under the proof offered, that each communication refers in apt terms to some other, so that the entire correspondence is identified by its own contents, and not by oral testimony. For instance, the letter following Collyer's answer to the telegram of Murphy & Mayo explains what he means by having \$5,000 net from the sale of the lands, and plainly authorizes the sale, provided his agents are willing to take \$500 as their commission.

It is urged by counsel for defendant in error that the letter from Collyer to his agents did not specifically set forth the terms of the sale on which he was willing to accept \$5,000 net for the land, and he concedes that, had this letter specifically stated that he would take \$5,000, payable one-third in cash, one-third in one year and one-third in two years, it would have authorized them to complete the sale on these terms. The trouble with this contention is that defendant in error seems to be impressed with the idea that a memorandum in writing, signed by the vendor, necessary to establish proof of a sale of real

estate, must all be contained in a single letter or other written communication. This is not the rule. If the terms of the contract can be collected from the correspondence of the parties, or from two or more separate papers referring manifestly to the same subject, it will be a sufficient memorandum within the meaning of the statute of frauds. All writings executed between the same parties, at the same time, and about the same subject, must be held as one instrument and construed together. *Perry v. Holden*, 22 Pick. (Mass.) 269; *Chickering v. Lovejoy*, 13 Mass. 51; *Carey v. Rawson*, 8 Mass. 159; *Stow v. Tift*, 15 Johns. (N. Y.) *463. We think, therefore, that the letter, read in connection with the telegram to which it replied, was a sufficient memorandum to authorize the agents of plaintiff to proceed with the sale on the terms stated in their telegram. And, again, while it is true that in this state we have held that an undelivered deed, signed and executed by the grantor and placed in the hands of his agent, is not, when standing alone, a sufficient memorandum to evidence a contract of the sale of real estate (*Wier v. Batdorf*, 24 Neb. 83), yet, in the very decision in which this rule is announced, the case of *Thayer v. Luce*, 22 Ohio St. 62, is cited with approval, and MAXWELL, J., in delivering the opinion, said:

“If the facts in the case under consideration brought it within those of the Ohio case, we would have no hesitancy in enforcing the contract.”

In *Thayer v. Luce*, *supra*, the facts were that the vendors, Luce and Fuller, had made an imperfect memorandum of a contract for the sale of real estate with the plaintiff, who was asking for specific performance. The memorandum contained no description of the property to be sold, but subsequently the grantors executed a deed fully describing the property and the terms of the sale, and submitted it to the grantee for inspection. After the deed was inspected by the grantee it was returned to grantors to await the completion of the sale, which the grantors subsequently refused to consummate, and, as an answer

to a suit for specific performance, they pleaded the statute of frauds. In disposing of the question, McIlvain, J., speaking for the court, said, among other things:

"That the memorandum alone is insufficient for that purpose is clear. The absence of necessary description of the subject matter of the contract is a fatal defect. The deed, however, supplies the defects in the memorandum, and taken together (if we may so construe them), we find in the two instruments the terms of a full and complete contract. That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the statute of frauds, is settled." Citing *Allen v. Bennet*, 3 Taunt. (Eng.) 169; *Jackson v. Lowe & Lynam*, 1 Bing. 9; *Owen v. Thomas*, 3 Myl. & K. 353; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Tallman v. Franklin*, 14 N. Y. 584; *Pollock v. Brainard*, 26 Fed. 732. Further on in the opinion, after admitting as an abstract proposition that an undelivered deed is not sufficient evidence of a subsisting contract between the parties, the opinion says:

"We think, however, that a distinction may well be taken between an instrument of writing in the usual form of a deed of conveyance which has never been delivered for any purpose, or which has been delivered for the purpose of transferring title, and a like instrument which has been delivered merely as an evidence of an executory contract, or as evidence in part of such contract. The distinction exists in the difference of intention with which the acts were performed, and the true intent in either case must be determined by the circumstances of the act, by the *res gestæ*. It is perfectly clear that such an instrument delivered by the apparent grantor to the apparent grantee under such circumstances as repel the conclusion that a transfer of title was intended, is inoperative as a conveyance. And it appears to me to be just as clear that the like delivery of such an instrument, under circumstances

which show an intention to make a proposition to sell the property therein described on the terms therein written, is a legitimate and proper way to negotiate a contract of sale, and instantly that the terms thus proposed are accepted, the contract of bargain and sale is complete—not executed in fact by transfer of title, but executory and evidenced by writing signed by the vendor within the meaning of the statute. Nor does it matter in whose possession the instrument may afterward be placed. The executory contract is subsisting, and will continue to be valid and binding upon the parties until mutually rescinded or consummated. Such is the case under consideration. The deed was signed by the defendant below and delivered to the plaintiffs, not as a conveyance of title, but as an evidence of their executory contract of bargain and sale.”

If this rule so announced and quoted with approval by MAXWELL, J., in *Wier v. Batdorf*, *supra*, should be applied to the case at bar, it would certainly determine the question that the delivery of the deed, notes and mortgage, and draft accompanying it in escrow to the First National Bank of Omaha, for the inspection and approval of the defendant, would certainly aid the letter written by plaintiff to his agents as to the terms on which he authorized them to contract for the sale of his lands. We are therefore of opinion that the learned trial court was in error in holding that the contract sued upon was not evidenced by any memorandum in writing signed by the grantor or his duly authorized agent, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

DANIEL C. BROWN ET AL. V. GARDNER COWLES.

FILED DECEMBER 21, 1904. No. 13,634.

Contract: BREACH: DAMAGES. The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are the probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same.

ERROR to the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed upon condition.*

George A. Adams and J. E. Philpott, for plaintiffs in error.

F. H. Woods, L. R. Ewart and H. V. Failor, contra.

LETTON, C.

This action was brought by defendant in error, Gardner Cowles, as plaintiff, against James M. Neff as principal, and the other defendants as sureties, upon an obligation given to secure the faithful performance by Neff of a contract made between Cowles and him for carrying the United States mail, as a subcontractor, between the city of Lincoln and the post office at Lancaster. The petition sets up the contract, and alleges a breach of the same by Neff's refusing to further carry the mail; and pleads that the plaintiff was put to great expense and damage in procuring another person to complete the contract. A general denial was filed by the defendant; the case tried to the court without the intervention of a jury, and a judgment rendered in favor of the plaintiff for the sum of \$77.40. No attack was made upon the petition before the trial, and it is now urged that it does not state a cause of action.

1. We think, however, it sufficiently sets forth the contract, its breach, and the items of damage which the plain-

tiff claims he suffered by reason of the failure of the defendant to carry out the contract.

2. It is objected that the court erred in the amount of recovery. The plaintiff asks judgment for \$110.40, the items of the claim being as follows: Hiring one Poppleton to obtain a man to complete the contract \$30; Poppleton's car fare from Algona, Iowa, to Lincoln, Nebraska, \$20; increased salary for man to complete the contract for $2\frac{1}{2}$ years \$45; Poppleton's hotel expenses and street car fare \$10; other expenses in carrying mail, \$5.40.

The rule is elementary that in an action for damages for breach of contract such damages only may be recovered as are the probable, direct and proximate consequences of the wrong complained of, and such as may fairly be supposed to have been within the contemplation of the parties at the time of the making of the contract as a probable result of the breach of the same. It requires no argument to show that the hiring of a man in the state of Iowa, sending him to Nebraska, and paying his wages, hotel and other expenses, could not reasonably be within the contemplation of the parties as the result of a failure of Neff to perform the contract. If Neff could be charged with railroad fare from Iowa, he could with equal propriety be charged with railroad fare from New York. There are no extraordinary conditions requiring such expenditures pleaded or proved. Such damages are entirely too remote and cannot be recovered. Whatever excess the plaintiff was compelled to pay in order to procure the services of another person at a reasonable and proper rate to furnish the services which Neff had agreed to perform, and which the plaintiff was bound to perform under his contract with the government, are proper and necessary items of damage which the plaintiff is entitled to recover in this action.

By its terms the contract terminated on the 30th day of June, 1902. This action was begun on the 21st day of March, 1901. The plaintiff is not entitled to recover in this action for damages which accrued after the action was

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brought. *Wittenberg v. Mollyncaux*, 59 Neb. 203. Neff refused to carry out the agreement on the 20th day of December, 1899. The plaintiff therefore would be entitled to recover the increased compensation which he was required to pay over and above the amount of the contract from the 20th day of December, 1899, when Neff refused to perform, until the 21st day of March, 1901, when this action was commenced. At the rate of \$18 a year this amounts to \$22.50. There is evidence that between the time that Neff refused to further carry on the contract and the time that a new contract was made with another subcontractor the plaintiff was required to pay the sum of \$5.40 to other parties for carrying the mail, in excess of the amount which he had agreed to pay Neff. The plaintiff seems to be entitled to the items of \$22.50 and \$5.40 paid in excess of the contract price, with interest at 7 per cent. from the 20th day of December, making a total of \$37.55.

If the defendant in error remits the sum of \$39.85 the judgment of the district court will be affirmed: Failing to do so, the cause will be reversed and remanded for a new trial.

AMES and OLDHAM, CO., concur.

By the Court: For the reasons stated in the foregoing opinion, if the defendant in error remits the sum of \$39.85 within 30 days the judgment of the district court is affirmed. Failing to do so, the judgment is reversed and the cause remanded for a new trial.

AFFIRMED UPON CONDITION.

ELIZABETH C. O'NEAL, ADMINISTRATRIX, APPELLEE, V.
BELLEVUE IMPROVEMENT COMPANY, APPELLANT, IM-
PLEADED WITH AMELIA P. LOWRIE ET AL., APPELLEES.

FILED DECEMBER 21, 1904. No. 13,668.

1. **Appeal: REVIEW.** It is the settled doctrine of this court that in reviewing a judgment of the district court upon appeal this court will only consider whether or not the pleadings and the evidence are sufficient to justify the judgment of the district court.
2. ———: ———. Upon an examination of the pleadings and the evidence, *held*, that they fully support the judgment of the district court.

APPEAL from the district court for Sarpy county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Harry Z. Wedgwood, for appellant.

William R. Patrick, *contra*.

LETTON, C.

This is an appeal from a judgment of the district court for Sarpy county, quieting title in the appellee to certain lots in the village of Bellevue. The action was brought by Elizabeth C. O'Neal, administratrix, as plaintiff, against the appellant and others as defendants. Before the trial a petition in intervention was filed by the appellees, to which answers were filed by the appellant. A demurrer to the plaintiff's petition was sustained, and the cause was tried upon the issues raised by the petition in intervention and the answers thereto. A number of errors in the proceedings leading up to the trial have been urged as grounds for reversal by appellant, but it is the settled doctrine of this court that, in reviewing a judgment of the district court upon appeal, this court will only consider whether or not the facts as shown by the pleadings and the evidence are sufficient to justify the judgment of the district court. *McNaughton v. Burke*, 63 Neb. 704, and cases cited. The

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petition in intervention alleges substantially that the interveners are the only heirs of Hugh M. O'Neal, deceased; that at the time of his death he was the owner in fee simple of the real estate in controversy; that he entered into the possession of the same in 1889, and was in the open, notorious, continuous, exclusive and adverse possession thereof, claiming title thereto, from that time until the time of his death in February, 1900. The petition further sets out that the appellants each claim some title or interest in the premises by virtue of certain tax deeds and other conveyances described therein, and alleges that each and all of said deeds are void, and that they constitute clouds upon the intereveners' title.

The petition states sufficient facts to constitute a cause of action in *quia timet*. The testimony offered on the part of the interveners fully supports the allegations of the petition. No evidence was offered on behalf of appellant.

We are of the opinion that the petition and the evidence fully support the judgment of the district court, and we recommend that it be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V.
MURTY D. O'DONNELL, BY MARY O'DONNELL, HIS NEXT
FRIEND.

FILED DECEMBER 21, 1904. No. 13,671.

1. **Negligence: DEMURRER: EVIDENCE.** A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.

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2. **Petition: AMENDMENT: CAUSE OF ACTION.** Original petition and amended petition examined and compared, and *held*, that the amended petition does not state a new or different cause of action from that set forth in the original petition.

ERROB to the district court for Lancaster county.
LINCOLN FROST, JUDGE. *Affirmed.*

Billingsley & Greene, R. H. Hagelin, M. A. Low, W. F. Evans and Paul E. Walker, for plaintiff in error.

T. J. Doyle and George A. Adams, contra.

LETTON, C.

This action was brought by Murty D. O'Donnell, by his next friend, Mary O'Donnell, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for injuries alleged to have been inflicted upon him while passing along Vine street in the city of Lincoln on his way home from school. For a statement of the case see *O'Donnell v. Chicago, R. I. & P. R. Co.*, 65 Neb. 612. After a judgment for the defendant error proceedings were prosecuted to this court, whereupon the cause was reversed and remanded to the district court. After the cause was remanded the plaintiff filed an amended petition, to which the defendant answered. Plaintiff filed a reply, the cause was again tried, judgment rendered for the plaintiff, a motion for a new trial filed and overruled, and the defendant now prosecutes error to this court.

There is only one ground of error relied upon and discussed in the briefs, and that is that the amended petition sets up a new and different cause of action from that alleged in the original petition, and that this new cause of action is barred by the statute of limitations. The essential parts of the first petition necessary to consider to determine this question are, that the defendant, on the 18th day of November, 1898, stopped a large freight train across Vine street between 18th and

19th streets, "and kept and wrongfully, carelessly and negligently held said train across said street, blockading all passageways along said street and the sidewalks along either side thereof, and for a long distance each way north and south therefrom, for an unusually long period of time, to wit, one-half hour and more, and that during all of the said time that said train of cars was so wrongfully, carelessly and negligently kept by the defendant across said street and obstructing the passage over and along the same and the sidewalks on either side thereof, and for a long distance each way north and south therefrom, there was no way for persons to go along said street or the sidewalks, or to in any way travel said street at said point, or across said railway track at said point, except to go between the cars composing said train. That the point or place where said railway track and said Vine street crossed each other at said time was in and near to a thickly settled part of the city of Lincoln, Nebraska, and there was at said time much travel over, upon and along said Vine street at said point and place, and the defendant at said time, and by so wrongfully, carelessly and negligently placing its said train of cars upon its said railway track, and across said Vine street for an unreasonable length of time, obstructed and prevented all travel along said Vine street at that time. That the plaintiff, Murty D. O'Donnell, was passing and traveling along said street on said day, and in the afternoon thereof, on his way home from school, and it became necessary for him to pass along said street at the point where said railway train was so wrongfully, carelessly and negligently by defendant kept across said street and obstructing the same, and in attempting to cross the said track, without any fault of his, and by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train upon the ground and railway track and under the wheels of the car of the same, and the said train of cars and the wheels thereof passed upon and over the leg of the plaintiff, seriously lacerating, injuring and damaging the

same. * * * That by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and by and through the negligence of the defendant and its employees, the plaintiff, Murty D. O'Donnell, has become and is permanently and seriously injured in the loss of his limb, and thereby made a cripple for life, that by reason of said injury so wrongfully, carelessly and negligently caused by the defendant, and because of said suffering and pain so likewise caused by the defendant, the plaintiff Murty D. O'Donnell, has been damaged," etc.

The allegations in the original and amended petitions, so far as the original petition is copied above, are substantially alike, though the language of the pleader is not exactly the same *verbatim et literatim*, and no question is raised as to their identity of allegation thus far.

In the amended petition, however, the following additional paragraph is inserted. "The plaintiff further avers that, at the time the plaintiff, Murty D. O'Donnell, was crossing said railroad track along said Vine street, which was so obstructed by the defendant, as aforesaid, on account of said obstruction remaining on said street for said unusual length of time, it became necessary for the plaintiff to go upon said cars and to cross the same in so doing; and while the plaintiff was thus upon said cars for the purpose of crossing said track, the defendant, through its engineer operating the engine which was hauling this train of cars, discovered the said plaintiff, Murty D. O'Donnell, and knew that he was a mere child of tender years, and defendant fully realized the perilous condition of said Murty D. O'Donnell, and the great peril and danger to said plaintiff, both of life and limb, by moving said train and continuing to move the same, while said plaintiff was in said perilous condition, through no fault or negligence upon the part of plaintiff, the defendant, notwithstanding its full knowledge of said danger to the plaintiff, and notwithstanding the fact that it had the power to instantly stop said train of cars and avert any possible injury to the plaintiff, continued to carelessly, negligently

and with wanton disregard for the safety of plaintiff to move said train of cars, thereby causing the injury, as hereinbefore described, to the plaintiff."

It is earnestly urged by the plaintiff in error that the allegations in the fourth paragraph of the amended petition thus set forth constitute a new and different cause of action from that contained in the original petition. It is argued that in the original petition there was no general allegation of negligence; that it was not based upon the negligence or improper conduct of the employees of the railway company, but rested entirely upon the allegation that the railway company obstructed a public street for an unwarranted length of time, compelling the plaintiff to pass between the cars, whereby he received the injuries for which he sought to recover, and that, if a new cause of action is stated, sufficient time has elapsed to bar a recovery. The plaintiff upon the other hand contends that the additional matter set forth in the amended petition is merely an amplification and more specific statement of the general allegations of negligence set forth in the original petition, and that under the pleadings in the original cause he was entitled to prove and did prove all the facts alleged in the amended petition.

The original petition sets forth in detail the blockading of the street by the train. It then alleges that "in attempting to cross the said track, without any fault of his, and *by and through the negligence of the defendant and its employees, he was violently and forcibly thrown from said train upon the ground and railway track and under the wheels of the car,*" and further alleges "that by reason of said injury so received by the plaintiff, Murty D. O'Donnell, and *by and through the negligence of the defendant and its employees, the plaintiff has become and is permanently and seriously injured,*" etc. Under these general allegations of the negligence of the defendant and its employees, any negligence upon the part of the employees of the defendant by reason of which the plaintiff was violently and forcibly thrown from the train could prop-

erly have been admitted in evidence. It is the settled doctrine of this court that a general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456; *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747. The most specific allegation of negligence in the *Wright* case was "that the said defendant, carelessly and negligently, by its employees and servants, in operating said train ran their said engine and train in, over, and upon said plaintiffs' stock, when by exercising proper care and skill in the management and handling of its engine and train it could have stopped said train long before striking said plaintiffs' stock." The court said: "Wright and others, in their petition in the case at bar, charged the railway company generally with negligence and under these allegations we think that it was competent for them to introduce evidence of the fact, if it was a fact, that the engineer in charge of the train saw, or by the exercise of due care could have seen, the cattle in time to have stopped the train and avoided injuring them. * * * In other words, where a pleader relies upon certain specific acts or omissions as negligence, he is limited to such specific acts or omissions. If he pleads negligence generally, he may introduce evidence of any act or omission which tends to support his pleading."

The gist of the fourth paragraph in the amended petition in this case is that the engineer, after he discovered the perilous condition of the plaintiff, continued to negligently move the train of cars, thereby causing the injury. In connection with this allegation it is important to note that in the opinion rendered upon the former hearing of the case in this court, which opinion was offered in evidence by the defendant, it is said:

"There was no conclusive presumption of negligence on the engineer's part, merely because he saw a boy of eight years jumping on the stirrup and ladder of a freight car going not more than three miles an hour, and jumping off

again, and failed to stop to remove him. Whether such failure to act on the engineer's part was negligence was for the jury to say. The acts complained of in this petition are the leaving of the train upon the crossing, and violently and forcibly throwing the plaintiff from the train, and passing of its wheels over plaintiff's leg, through 'negligence of the defendant and its employees.' *Whatever negligence was connected with these acts, and caused the injury through them, was provable, and to be considered.*" And again: "Instruction 9, as given by the court, told the jury that a child jumping on and off a train would be a trespasser, and this fact, if they found it, should be considered, and would constitute contributory negligence on his part, if they found he was of sufficient age and discretion to be guilty of negligence. It is also stated that if defendant should discover the child in imminent danger, and failed to exercise reasonable care, where such care would have prevented the injury, the child's action would be no defense. The court's instruction submitted the question fully."

It was held therefore that one of the facts which was proper to be proved under the general allegation of negligence in the original petition was that the engineer discovered the plaintiff upon the train and negligently continued to move the same after such discovery, thereby causing, as claimed, the injury of the plaintiff, and that evidence tending to show negligence of this character was properly introduced at the former trial. This is the law of the case and must be applied here.

The plaintiff might have been required by motion at the first trial to have made his petition more definite and certain, and might properly have included therein the specific facts now alleged in the fourth paragraph of the amended petition. He was not required to do so, but did so on his own volition upon the second trial. Such allegations were merely an amplification and expansion of the facts set forth in the first petition, and constitute no change of the cause of action and no new or different

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claim. The general allegation of negligence in the form made in the first petition is wide enough to include them. We think it unnecessary to cite any further authority in this matter. The rules which govern the determination of this case are plain and positive. We think it clear that the amended petition is only a more expanded statement of the original one.

We recommend therefore that the judgment of the district court be affirmed.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CORA ALLEN V. ARTHUR H. RUSHFORT.

FILED DECEMBER 21, 1904. No. 13,674.

1. **Contract: LIEN: WAIVER.** Where a written contract of sale is made of an entire crop of standing hay at an agreed price per ton, part payment is made, and the purchaser takes possession of the crop, cuts and stacks it, and bales and carries away part of it, the title to the crop passes to him. The fact that the contract provides that the hay is to be paid for before taken from the farm merely gives a lien on the hay for the unpaid purchase money, which may be waived by the seller.
2. **Action: ERROR.** Under the pleadings and evidence in this case, *held*, that the seller waived her lien; that an action for the contract price was properly brought, and that the case should have been submitted to the jury.

ERROR to the district court for Douglas county: **WILLIAM A. REDICK, JUDGE.** *Reversed.*

Weaver & Giller, for plaintiff in error.

P. A. Wells, contra.

LETTON, C.

This is an action for the purchase price of a certain crop of timothy hay which it is claimed was sold to the defendant under the following contract of sale: "This agreement, made this 30th day of June, 1902, between Cora Allen and A. H. Rushfort of Omaha, Witnesseth, that the first party has sold to the second party the crop of timothy hay now growing on the northwest quarter of the southeast quarter of section 17, town 16, range 10, for \$4.50 per ton net to first party; the hay to be paid for before taken from the farm. The first party has paid \$50 cash to bind the bargain. Signed, Cora Allen, Arthur H. Rushfort. Witness, J. W. Kennedy." The petition alleges that when the crop matured the defendant cut and harvested the hay, stacked it upon the land, and subsequently baled a part of it and removed it, but refuses to pay for it. It is further alleged that the crop weighed 100 tons; that it was of the value of \$450; that the defendant paid \$50 upon the purchase price, and that he has refused to take the balance of the hay, and refused to pay the balance of the price. The defendant admitted the execution of the contract, but alleged that there was a contemporaneous oral agreement by which the hay mentioned should be weighed upon scales situated upon the premises of the plaintiff's mother; that he cut and stacked the hay and took 30,300 pounds, which was weighed upon said scales; that in weighing of the hay the plaintiff fraudulently manipulated the scales so that they did not correctly weigh the hay; that when he complained of this, the plaintiff refused to permit the hay to be weighed on any other scales or to permit the defendant to take any more hay unless weighed upon these scales, and the weights thereby indicated accepted as the correct weights of the hay. He alleges that by this fraud he was prevented by the plaintiff from the further performance of the contract. He further sets out a counterclaim for labor in the harvesting and stacking of 50 tons of hay, which he al-

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leges remains on the premises, and for loss of profits occasioned by the plaintiff's preventing him from removing the said 50 tons of hay. The reply was a general denial. At the trial, upon the conclusion of the plaintiff's evidence, the court upon the defendant's motion instructed the jury to return a verdict in favor of the defendant, which was done, and the plaintiff's action was dismissed. From this action of the court the plaintiff has prosecuted error.

The evidence is substantially to the effect that, after the execution of the written contract, the defendant went upon the plaintiff's premises and cut and stacked the hay. After it had been standing in stack about 30 days he took a haypress to the land, and worked at pressing the hay for over a week. He then hauled part of it to the railroad station at Valley for shipment. After he had taken six loads away he told the plaintiff he had taken about 15 tons, while she claimed that about 24 tons had been taken. He then complained about the scales being incorrect, and plaintiff told him not to stop on that account; that he could weigh the hay at Valley at Mr. Whitmore's scales, and she would take Whitmore's word for it. The plaintiff went to see him at Valley, and told him she wanted pay for it. He offered to pay for 21 tons, and upon the plaintiff asking him to put the money in the bank at Valley, he put \$50 in the bank. The next morning he went to the farm to get the machine, and refused to take any more hay. After that, in South Omaha, the plaintiff asked him if he would release the contract and pay for one carload, which he refused to do. It will be seen that the plaintiff proved the execution of the contract and a payment upon the same, the cutting and stacking of the hay by the defendant, his removal of a part of the same, and a refusal upon his part to take and pay for the remainder which he had stacked, the only reason being that he was dissatisfied with the weight as given by her scales, but that she told him she would accept the weight from Whitmore's scales or the railroad scales at Valley.

The defendant argues that the petition does not state

a cause of action, and that the evidence failed to prove a cause of action and would not support a verdict. As to the first ground, we think the petition is sufficient. It sets up the contract for the sale of the entire crop, the price, part payment upon the same, the acceptance and removal of a portion of the crop, the number of tons in the crop and the failure to pay for the same. We do not see what is lacking in this petition.

As to the second ground, it is contended that the evidence shows that the contract is executory only. The contract recites that the plaintiff has sold to the defendant the crop of timothy hay, specifies the price and the time of payment, and recites that \$50 has been paid upon the same. Further than this, the evidence shows that the defendant took actual and manual possession of the property sold. He expended time and labor upon the same, and changed its condition from that of standing grass to dry hay in stack. The only thing that remained to be done was to ascertain how much the whole crop weighed, and pay the balance of the price. The defendant argues that under such a contract the title did not pass until payment was made. A part payment had been made, however, and subsequently the plaintiff parted with her control over the grass, and the defendant took possession of it, the plaintiff reserving only a right to receive the remaining purchase price upon the removal of the property from her land. The rule contended for by the defendant, that where specific goods are to be weighed, measured or tested, if this is necessary to fix the aggregate sum to be paid, title will not pass until this is done, does not apply where a sale is made of an entire mass, such as in the instant case, but does apply to circumstances where a certain fixed amount is to be separated from a mass; the reason being that in the one case the identity of the goods cannot be ascertained until their separation, but in the other there is no question of identity. The distinction is properly stated in Benjamin, Sales (7th ed.), sec. 346: "The distinction in all these cases does not depend so much upon

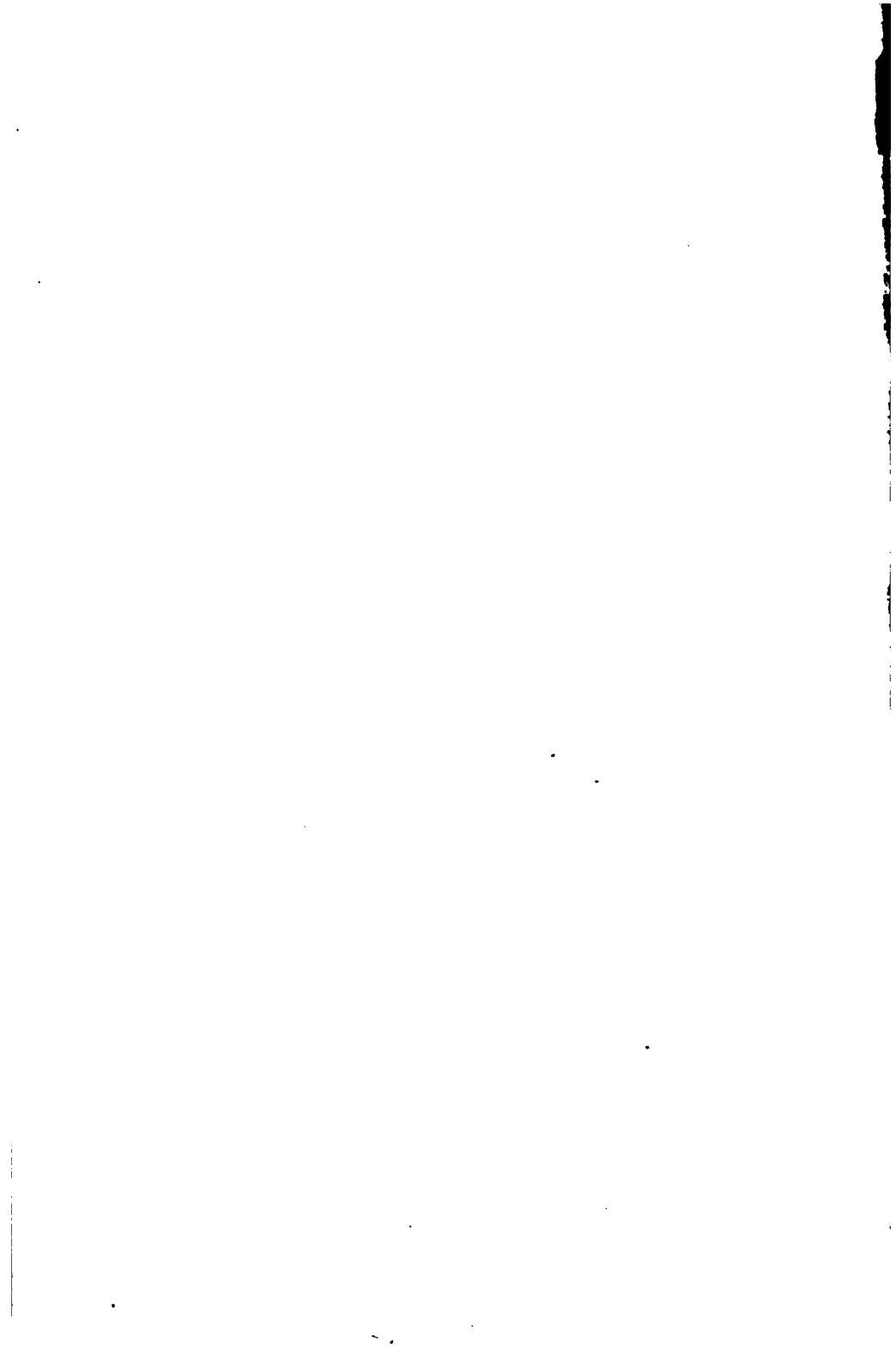
what is to be done *as upon the object which is to be effected by it*. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates the change of the title is effected." In the instant case the crop of hay was appropriated to the defendant by the contract. He agreed to take it and pay the stipulated price. He paid part of the price, reduced the crop to his own possession, and became entitled to remove the same from the premises as soon as he paid the price for the remainder. The provision as to retention of possession gave the plaintiff a lien on the property, as between her and the defendant, until it was paid for, but she might waive her lien, and the evidence shows that she did waive it by giving him permission to remove the hay and weigh it elsewhere as soon as he complained of her scales. The intention of the parties evidently was to transfer the title to the grass at the time the contract was signed and the \$50 paid, subject to the lien provided in the contract, and the court will construe the contract in accordance with their intention and with their subsequent conduct.

For these reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

OLDHAM and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

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1. The constitutionality of a law is determined by what is authorized by its provisions. *City of Beatrice v. Wright*.. 689
2. The act of 1903, amending secs. 18 and 20, art. III, ch. 18, and sec. 3a, art. XIII, ch. 83, Comp. St., 1901, relating to the deposit of county funds, *held* constitutionally adopted. *State v. Cronin*..... 636, 642
3. Ch. 16, secs. 216-227, Comp. St., is not in violation of art. III, or of sec. 1, art. VI of the constitution, nor does it give the state banking board such powers as to be unconstitutional for that reason. *State v. Northwestern Trust Co.* 497
4. The provisions of the drainage law, secs. 1-28, art. I, ch. 89, Comp. St., do not violate sec. 21, art. I of the constitution, providing that the property of no person shall be taken or damaged for public use without compensation. *Morris v. Washington County*..... 174
5. The provisions of the irrigation act, sec. 28, art. II, ch. 93a, Comp. St., *held* not to be unconstitutional. *Farmers Canal Co. v. Frank*..... 136
6. Sec. 7, art. IX of the constitution, prohibits the legislature from imposing taxes on municipal or other corporations for corporate purposes. *Held*, That a tax sought to be imposed upon fire insurance companies under authority of the legislature is unconstitutional. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

Constitutional Law—Concluded.

7. An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question the validity of the tax at some stage of the proceedings. *Hacker v. Howe*..... 385
8. The fact that no notice of sale of land for taxes under ch. 76, laws of 1903, is required other than that contained in the act itself does not render it void as taking property without due process of law. *City of Beatrice v. Wright*.... 689
9. The provisions of the act for the sale of land for taxes, ch. 76, laws of 1903, held in conflict with sec. 4, art. IX of the constitution, which denies to the legislature power to release or discharge taxes, or to commute the same. *City of Beatrice v. Wright*..... 689
10. The title to ch. 68, laws 1881, "An act to fix a maximum standard of freight charges," etc., contains only one subject. *Chicago, B. & Q. R. Co. v. Anderson*..... 856
11. Secs. 39 and 40, art. I, ch. 77, Comp. St., 1901, providing for the assessment of railroad property for taxation are valid. *Chicago, B. & Q. R. Co. v. Richardson County*..... 482
12. Secs. 39 and 40, art. I, ch. 77, Comp. St., 1901, are not invalid as a taking of property by taxation without due process of law. *State v. Back*..... 402
13. Sec. 592 of the code, limiting the time for commencing proceedings in error, is constitutional. *Chicago, R. I. & P. R. Co. v. Sporer*..... 372
14. Ch. 104, laws of 1899, amending sec. 125, ch. 58 of the criminal code, 1873, is not in conflict with sec. 11, art. III of the constitution. *Moline v. State*..... 361

Contracts. See BONDS, 4.

1. Where plaintiff claims that a certificate of deposit was indorsed to a county attorney under an agreement that he would dismiss a criminal prosecution, a court will not aid him to regain possession of the property. *Johnson v. Owen*, 477
2. The alteration of a written contract by a stranger will not avoid the contract, where the contents as it originally stood can be ascertained. *Colby v. Foxworthy*..... 378

Contribution. See PARTNERSHIP, 1.

Corporations.

1. Corporation held to be an instalment investment company under ch. 29, laws 1903, Comp. St., ch. 16, secs. 216-227. *State v. Northwestern Trust Co*..... 487
2. The legislature has power to provide for publicity of the condition and business methods of such corporations. *State v. Northwestern Trust Co*..... 497

Corporations—Concluded.

3. The president of a corporation is the proper party to sign a petition for repaving in behalf of the corporation. *Bddy v. City of Omaha*..... 561

Costs.

- When public officers are compelled to perform a statutory duty by mandamus, costs will be adjudged against them when the relator is without fault. *State v. Carlson*..... 837

Counties and County Officers. See DRAINS, 1. MANDAMUS, 5.

1. Ch. 8, laws 1899, the "Refunding Bond Act," provides for an appeal from findings of the district court as to the validity of county bonds, and authorizes the supreme court to make findings which are binding upon all parties to the record. *Colburn v. McDonald*..... 431
2. In such a proceeding the supreme court will only render a decision as to validity of the bonds. *Colburn v. McDonald*.. 431
3. It will not determine the effect of a decision as to innocent purchasers not parties to the record. *Colburn v. McDonald*, 431
4. A proposition to vote bonds in aid of a railroad is not void because it authorizes the county to accept capital stock of the company. *Colburn v. McDonald*..... 431
5. Where bonds in aid of a railroad are to be issued at a future time, the assessed valuation of the county last made before such bonds are actually issued is the basis in limiting the amount of such issue. *Colburn v. McDonald*..... 431
6. A municipality cannot repudiate its bonds after the compromise of a suit in which their validity was in issue, unless such bonds are absolutely void. *Colburn v. McDonald*.. 431
7. Sec. 42, ch. 28, Comp. St., 1901, limits the sum which may be retained by a county treasurer to fees and commissions actually received. *Maurer v. Gage County*..... 441
8. County boards in settling with county officers act ministerially; and in allowing officers to retain a greater sum than limited by law, their action is void, and the county may recover the excess. *Maurer v. Gage County*..... 441
9. It is the duty of county treasurers to deposit county funds as provided by sec. 18, art. III, ch. 18, Comp. St. *State v. Cronin*..... 636, 642
10. When a county has refused to participate with an adjoining county in repairing a bridge, it is no defense to an action for contribution that the plaintiff county in making the repairs proceeded irregularly in obligating itself to pay for them. *Cass County v. Sarpy County*..... 93

Courts. See APPEAL AND ERROR, 11-14.

1. The supreme court is bound by the construction of the extradition laws adopted by the supreme court of the United States. *Fannison v. Christian*..... 703
2. The supreme court has no original jurisdiction of an action to cancel municipal taxes on insurance companies. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 112
Provident S. L. A. Society v. City of Omaha..... 113
3. In an application for mandamus to compel the enforcement of the law against the sale of liquor on Sunday, the district court has concurrent jurisdiction with the supreme court. *State v. Moores*..... 5
4. The opinions of the commissioners of the supreme court, designated as "unofficial," have no value as precedent in the sense in which the doctrine of *stare decisis* is applied. *Flint v. Chaloupka*..... 34

Covenants.

1. In an action for damages for breach of a covenant for quiet enjoyment in a deed, the real consideration may be proved by parol. *Holmes v. Seaman*..... 300
2. In such an action growing out of an exchange of lands, the measure of damages is the value of the property to which the plaintiff was entitled. *Holmes v. Seaman*..... 300

Creditors' Suit. See JUDGMENT, 2.

- The beginning of a creditor's suit gives a specific lien upon the property which it is sought to reach, and during its pendency the judgment does not become dormant as to such property. *Flint v. Chaloupka*..... 34

Criminal Law. See HOMICIDE. INDICTMENT AND INFORMATION. JURISDICTION.

Appeal.

1. To effect an appeal in a misdemeanor case tried in an inferior court, the defendant must enter into a recognizance, with sureties, as is provided by sec. 324 of the criminal code. *Zobel v. State*..... 427

Continuance.

2. Where accused's witnesses were present, held that his application for a continuance, after the prosecutrix had changed her evidence, was properly denied. *Blair v. State*.. 501

Evidence.

3. Objection to evidence of a conversation over the telephone on the ground of want of identification of the person addressed, held properly overruled. *Lillie v. State*..... 228
4. In the trial of one charged with murder by firearms, it is not error to permit evidence that the defendant was familiar with the use of firearms. *Lillie v. State*..... 228

Criminal Law—Continued.

5. It is discretionary with the trial court to permit evidence of experiments to illustrate transactions that have been testified to. *Lillie v. State*..... 228
6. The admission of evidence not necessarily injurious, and not objected to when offered nor in the petition in error, is at most error without prejudice. *Lillie v. State*..... 228
7. In a murder trial it is proper to prove the physical conditions existing in the vicinity of the murder. *Lillie v. State*. 228
8. In a murder trial it is competent to prove the subsequent conduct, appearance and statements of the accused. *Lillie v. State*..... 228
9. In criminal trials the weight to be given evidence of previous good character is for the jury. *Lillie v. State*..... 228
10. Proof of motive is always competent in murder trials. *Lillie v. State*..... 228
11. It is not indispensable in criminal trials that a motive for the crime be proved. *Lillie v. State*..... 228
12. In a prosecution for murder committed with firearms, evidence that the defendant had access to such a weapon is not indispensable. *Lillie v. State*..... 228
13. Evidence in a trial for rape held sufficient to resist a demurrer thereto. *Blair v. State*..... 501
14. Held, that the record discloses no reversible error in receiving and rejecting evidence. *Blair v. State*..... 501
15. Evidence is relevant which shows that the accused threatened or assaulted a witness, endeavored to prevail on him to abscond and to induce him to testify falsely, or concealed his whereabouts. *Blair v. State*..... 501
16. In a prosecution for statutory rape evidence may be received to prove adulterous disposition of the parties. *Blair v. State* 501
17. In a prosecution for rape, evidence is admissible to prove that the accused concealed the prosecuting witness. *Blair v. State*..... 501
18. In a prosecution for rape, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence. *Woodruff v. State*... 815
19. In a prosecution for rape, evidence that the accused promised to marry prosecutrix if any trouble arose is admissible. *Woodruff v. State*..... 815
20. Evidence in such case that the prosecutrix became pregnant is admissible. *Woodruff v. State*..... 815
21. Any attempt to suppress evidence, and prevent a trial by

Criminal Law—Continued.

- flight may be shown against defendant in a criminal case.
Woodruff v. State..... 815
22. In a prosecution for rape, an attempt by accused to have an abortion committed upon the prosecutrix may be shown.
Woodruff v. State..... 815
23. In a prosecution for rape, where the previous chastity of the prosecutrix is in issue, it is not error to show that the prosecutrix was not aware that the accused was a married man. *Woodruff v. State*..... 815
24. In a prosecution for rape, where the previous chastity of the prosecutrix is involved, evidence of the general reputation of the prosecutrix is not admissible to prove prior unchastity. *Woodruff v. State*..... 815
25. To prove the previous unchastity of a prosecutrix in a charge of rape, evidence of the general reputation for unchastity of an associate is not admissible. *Woodruff v. State* 815
26. The admission of evidence that a third party, with whom the prosecutrix was alleged to have had illicit intercourse, was out of the state, held not prejudicially erroneous. *Woodruff v. State*..... 815
27. Identification of person accused of uttering a forged check held sufficient. *Mays v. State*..... 723
28. Statement of third person that he was guilty of the crime held hearsay. *Mays v. State*..... 723
29. Written statement of third person, not sworn to, that he committed the crime, not in the form of a deposition, is not competent evidence. *Mays v. State*..... 723
30. Proof of alibi. *Mays v. State*..... 723
31. A record of a stock-yards company of the receipt of stock, copied from a book of original entries, is not competent evidence for the purpose of tracing cattle, alleged to have been stolen, to the possession of the accused. *Donner v. State* 263
32. Where evidence of abandonment is conflicting, the supreme court will not pass on its sufficiency. *Cuthbertson v. State*.. 727
33. Evidence held sufficient to sustain a conviction of obtaining deed by false pretenses. *Moline v. State*..... 361

Instructions.

34. Instructions in a trial for obtaining a deed by false pretenses approved. *Moline v. State*..... 361
35. In a criminal trial it is not error to instruct the jury that the defendant is under no obligations to testify, and that

Criminal Law—Continued.

- failure to testify creates no presumption against him.
Lillie v. State..... 228
36. An instruction disparaging the evidence of the accused is erroneous. *Donner v. State*..... 263
37. An instruction as to "reasonable doubt" criticised. *Lillie v. State*..... 228
Mays v. State..... 723
38. That a clause of an instruction is incomplete is not ground for a reversal, if the paragraph is clear. *Blair v. State*..... 501
39. In a prosecution for rape an instruction limiting evidence of subsequent acts of illicit intercourse to corroborative purposes, held proper. *Woodruff v. State*..... 815
40. In a prosecution for rape an instruction limiting evidence that accused endeavored to have an abortion committed upon the prosecutrix to corroborative purposes, held proper. *Woodruff v. State*..... 815

Jury.

41. In criminal trials the qualification of a juryman is one of fact for the court. *Lillie v. State*..... 228
- *New Trial*.
42. Equity will not grant a new trial in a criminal case on the ground of newly discovered evidence. *Hubbard v. State*... 62
43. The district courts have no inherent or common law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term. *Hubbard v. State*..... 62
44. The jurisdiction of the district courts to grant new trials in criminal cases is derived from the statute. *Hubbard v. State*..... 62
45. Secs. 490-492 of the criminal code are the exclusive source of power of the district courts to grant such new trials. *Hubbard v. State*..... 62
46. Sec. 318 of the code has no application to the granting of new trials in criminal cases. *Hubbard v. State*..... 62
47. In capital cases a new trial should not be allowed on account of newly discovered evidence unless beneficial to the defendant. *Lillie v. State*..... 228
48. Where in a criminal case a prejudicial instruction is given without testimony to sustain it, a new trial will be granted. *Blair v. State*..... 368

Trial.

49. On the trial of one for abandonment of wife the prosecution should not be permitted to prove improper conduct of the

Criminal Law—Concluded.

accused with other women before the desertion took place.

Cuthbertson v. State..... 727

50. It is within the sound discretion of the trial court to permit a party to reopen his case and introduce further evidence.

Blair v. State..... 501

51. An objection to the appearance of private counsel to assist the county attorney should be made at a suitable time and be supported by some showing that the county attorney did not request or require assistance. *Blair v. State*..... 501

52. An objection to the appearance of private counsel made in connection with the examination of a witness, and without showing, *held* properly overruled. *Blair v. State*..... 501

53. When men might differ as to a reasonable doubt of defendant's guilt, it is a question for the jury. *Lillie v. State*.... 228
Venue.

54. Prosecution for abandonment must be in the county where the parties resided at the time of separation, and where the wife resides when the neglect to maintain occurs. *Cuthbertson v. State*..... 727

Verdict.

55. In a trial for robbery a verdict will not be set aside for want of evidence, unless clearly wrong. *Henry v. State*.... 252

Witnesses.

56. It is not error for the court to request counsel to desist from further cross-examination of a witness along improper lines. *Woodruff v. State*..... 815

57. A trial court has a large discretion in granting or refusing permission to ask a witness leading questions. *Woodruff v. State*..... 815

58. The trial court may permit leading questions, on direct examination, to a reluctant witness. *Blair v. State*..... 501

59. In a criminal action, when accused is a witness, he is subject to the rules governing the usual cross-examination. *Ferguson v. State*..... 350

60. The credibility of accused as a witness is to be tested by the principles applicable to all witnesses. *Ferguson v. State*, 350

Damages. See COVENANTS, 2. INSTRUCTIONS, 1, 2.

1. Rule of damages for breach of contract stated. *Brown v. Cowles* 896

2. In an action against a city for personal injuries, \$10,000 damages *held* excessive, and remittitur ordered. *City of South Omaha v. Sutcliffe*..... 746

3. In an action on a saloon keeper's bond for damages caused by intoxication, a verdict of \$2,000 *held* not excessive. *Felsch v. Babb*..... 736

Deeds. See COVENANTS. CRIMINAL LAW, 33.

Depositions.

By cross-examining a witness testifying by deposition, one does not waive objections to his competency. If the evidence in chief is excluded, the cross-examination should also be. *Bentley v. Estate of Bentley*..... 303

Descent and Distribution.

1. To constitute an advancement under sec. 37, ch. 23, Comp. St., 1903, it is necessary that the ancestor express that it be an advancement, or that he charge it in writing, or that the child acknowledge it in writing as an advancement. *Lodge v. Fitch*..... 652
2. A debt from an heir to an ancestor may be converted by the ancestor into an advancement, but when such debt is evidenced by note or bond this fact raises a strong presumption that the transaction was intended as a loan and not an advancement. *Lodge v. Fitch*..... 652
3. Evidence held insufficient to show a note executed by a daughter to her father was intended as an advancement. *Lodge v. Fitch*..... 652

Divorce.

In a divorce suit against a nonresident who appears in the cause, the court has jurisdiction to grant a divorce to defendant upon his cross-petition. *Pine v. Pine*..... 463

Drains.

1. A county board, in fixing assessments to pay for the construction of a drainage ditch, under art. I, ch. 89, Comp. St., 1899, acts judicially. *Dodge County v. Acom*..... 71
2. From such judgment error lies to the district court, and its findings have the same weight as the verdict of a jury. *Dodge County v. Acom*..... 71
3. The drainage of swamp lands is of general public utility, for which the legislature may create local administrative organizations. *Neal v. Vansickle*..... 105
4. Assessments for local improvements are void if in excess of the benefits conferred, or if levied without notice. *Neal v. Vansickle*..... 105
5. Where a ditch constructed jointly by two counties has proved insufficient, the county board of one of the counties has power to adopt a new system, of which the old ditch shall form a part, and assess the cost of construction upon the lands benefited. *Morris v. Washington County*..... 174

Ejectment.

1. In ejectment, title by adverse possession may be proved under a general denial, and when such title is relied upon

Ejectment—Concluded.

the defendant may have the jury instructed with reference to the same if any competent evidence has been introduced to support that issue. *Link v. Campbell*..... 310

2. In ejectment, where the defendant's answer is a general denial, it is not error to instruct the jury that the plaintiff must recover upon the strength of his own title. *Link v. Campbell*..... 310

3. In an action to try title to land against one in possession plaintiff must recover upon the strength of his own title. *Williams v. Daughetee*..... 270

Election of Remedies.

If, in making an election, one proceeds in ignorance of substantial facts, he may, when informed, adopt a different remedy. *Lamb v. Rooney*..... 322

Elections. See **INJUNCTION**, 2.

Eminent Domain.

1. Under the provisions of sec. 21, art. I of the constitution, the owner of property taken for a highway is entitled to the fair market value of the land taken, and also such additional damages as accrue to the remainder of the tract. *Scace v. Wayne County*..... 162

2. Where land is divided by a highway, the depreciation in value, if any, of the entire tract, after deducting special benefits, is a proper element of damage. *Scace v. Wayne County*..... 162

3. The rights of the owner of land over which a section line extends are the same, with reference to the assessment of damages for the location of a highway thereon, as those of the owners of other real estate. *Scace v. Wayne County*... 162

Equity. See **CRIMINAL LAW**, 42. **ESTOPPEL**, 1. **MUNICIPAL CORPORATIONS**, 13. **NEW TRIAL**, 5-10.

1. Where an adequate remedy exists at law, equity will not assume jurisdiction. *Brown v. Reed*..... 167
2. Equity will enforce a trust with respect to property stolen from the beneficial owner. *Lamb v. Rooney*..... 322
3. One who loses a right by failure to inquire when it is his duty to inquire is not entitled to relief in equity on the ground of mistake. *Farrell v. Bouck*..... 375

Estoppel. See **INTOXICATING LIQUORS**, 5.

1. In a foreclosure sale where a tax lien is deducted from the appraised value of the debtor's interest, and the purchaser takes advantage of the deduction, he cannot deny its validity in a suit to enjoin collection of the taxes. *Eddy v. City of Omaha*..... 550

Estoppel—Concluded.

2. If the negligence of one induces an act whereby an innocent man is injured, the culpable party must sustain the loss. *Humphrey Hardware Co. v. Herrick*..... 373
3. A party is estopped to complain of a ruling made at his request. *Holmes v. Seaman*..... 309

Evidence. See BASTARDY, 3, 5. BILLS AND NOTES, 2, 3, 5. CARRIERS, 8. COVENANTS, 1. CRIMINAL LAW, 3-32. DESCENT AND DISTRIBUTION, 3. HABEAS CORPUS, 6. INJUNCTION, 4. MASTER AND SERVANT. NEW TRIAL, 10. PARTNERSHIP, 2. RAILROADS, 4, 9. STATUTE OF FRAUDS, 3-6. TELEGRAPHS AND TELEPHONES.

1. Mortuary tables are admissible to show expectancy of life, but are not binding on the jury. *City of South Omaha v. Sutcliffe*..... 746
2. A preponderance of evidence is all that is required to maintain an issue in a civil action. *Link v. Campbell*..... 307
3. Expert testimony must be based upon supposed facts of the existence of which there is evidence before the court. *Goken v. Dalluge*..... 16
4. Opinions of medical experts as to the cause or effect of a physical injury are admissible. *City of South Omaha v. Sutcliffe* 746
5. Parol evidence cannot be received for the purpose of modifying or explaining an unambiguous written agreement. *Agnew v. Montgomery*..... 9
6. In actions for personal injuries, every indirect injury need not be alleged to lay the foundation for such proof on the trial. *City of South Omaha v. Sutcliffe*..... 746
7. Evidence in a personal injury case held not sufficient to bring the injury within the reason of the "humane doctrine" or "last chance." *McLean v. Omaha & O. R. R. & B. Co.*..... 450
8. Evidence in an action for personal injuries held not sufficient to sustain the judgment. *Chicago, B. & Q. R. Co. v. Roberts*..... 539
9. Evidence in an action for personal injuries caused by a defective sidewalk, held sufficient to sustain the judgment. *City of Minden v. Vedene*..... 647
10. Evidence in an action for personal injuries held not sufficient to sustain the judgment. *Fremont Telephone Co. v. Keeler*..... 613
11. Evidence in an action on account held sufficient to sustain the judgment. *Horner v. Hugbanks*..... 467

Evidence—Concluded.

12. Evidence in a suit to cancel a mortgage held sufficient to sustain the judgment. *Faulkner v. Powell*..... 474
13. Evidence in an action on an insurance policy examined, and held that no waiver has been proved. *Western Travelers Accident Ass'n v. Tomson*..... 661
14. Evidence in an action of forcible detainer held sufficient to sustain the judgment. *Thull v. Allen*..... 760
15. Evidence in an action to enforce a pledge, held to support the judgment. *Western Fly Guard Co. v. Hodges*..... 313
16. Evidence in a proceeding to recover value of improvements made by occupying claimant, held insufficient to sustain the findings. *Gombert v. Lyon*..... 319

Exceptions, Bill of.

The trial court has no authority to extend the time for preparing and serving a bill of exceptions more than 80 days from the adjournment of the term. *Stock v. Luebben*..... 254

Executors and Administrators.

1. In proceedings for the sale of real estate to pay debts of a deceased person, judgments of the district court will not be disturbed unless mistakenly made, or there is an abuse of discretion. *In re Estate of Parker*..... 601
2. Upon final settlement of an executor's accounts he is entitled to credit for the sum paid to satisfy a mortgage, where the will and order of the county court authorized it. *Patrick v. Patrick*..... 454
3. An application by an executor to sell real estate is a special statutory proceeding. *Birby v. Jewell*..... 755

Extradition. See HABEAS CORPUS.

1. Sec. 364 of the criminal code does not authorize extradition of a person charged with crime against the laws of another state without proof that he is a fugitive from justice. *Dennison v. Christian*..... 703
2. The warrant need not state that the governor has found that the accused is a fugitive from justice; the issuing of the warrant raises that presumption. *Dennison v. Christian*, 703

False Pretenses. See CRIMINAL LAW, 33, 34.

Forgery. See CRIMINAL LAW, 27-30.

Fraudulent Conveyances. See HOMESTEAD, 4.

Transactions between near relatives which tend to hinder creditors should be carefully scrutinized. *Penn v. Trompcn*. 273

Habeas Corpus.

1. The judgment of a district court in a proceeding in habeas corpus will not be reviewed on appeal. *In re Greaser*..... 612
2. The writ of habeas corpus cannot operate as a proceeding in error. *Michaelson v. Beemer*..... 761
3. Where a prisoner is held under a void commitment, but is properly informed against, on habeas corpus he should be discharged on the illegal commitment, and remanded to the court having jurisdiction of the information. *Michaelson v. Beemer*..... 761
4. In habeas corpus to obtain the discharge of one held under warrant in extradition, the return need not contain affirmative allegations of all the facts upon which the extradition proceedings are based. *Dennison v. Christian*..... 703
5. In extradition, the governor must determine whether the person demanded is charged with a crime, and whether he is a fugitive from justice. *Dennison v. Christian*..... 703
6. In determining the sufficiency of evidence in habeas corpus, the supreme court will not regard errors in admitting incompetent evidence, if, upon the evidence conceded to be competent, a correct conclusion be reached. *Dennison v. Christian* 703
7. The relator in habeas corpus should not be cross-examined on matters not relating to his examination in chief. *Dennison v. Christian*..... 703

Highways.

1. A township is not liable for injuries caused by reason of defects in highways. *Wilson v. Ulysses Township*..... 307
2. One who accepts an allowance for damages caused by the location of a public road is concluded thereby. *Stocker v. Nemaha County*..... 255

Homestead.

1. Issues made upon allegations in intervener's petition to quiet title in a homestead held reviewable on appeal. *National Bank of Commerce v. Chamberlain*..... 469
2. Homestead rights cannot be divested by the act of the husband alone, but subsist in the wife after she has been abandoned by her husband. *National Bank of Commerce v. Chamberlain*..... 469
3. Both an intention to abandon and an actual abandonment must concur to show an abandonment of the homestead. *National Bank of Commerce v. Chamberlain*..... 469

Homestead—Concluded.

4. A homestead is not a subject of fraudulent alienation.
National Bank of Commerce v. Chamberlain..... 469
5. A homestead cannot be disposed of at administrator's sale.
Birby v. Jewell..... 755

Homicide. See CRIMINAL LAW, 4-12.

1. An instruction purporting to state the offense of murder which omits material elements of the offense charged in the indictment is erroneous. *Hans v. State*..... 288
2. In a trial for murder, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous. *Hans v. State*..... 288

Husband and Wife. See CRIMINAL LAW, 32, 49, 54.

1. The common law disability of husband and wife to sue each other is removed by statute. *Trayer v. Setzer*..... 845
2. The common law rule that a husband, because of the marriage relation, is liable jointly with his wife for torts committed by her in his presence does not exist in this state.
Goken v. Dalluge..... 16
3. In an action on account against a married woman, plaintiff must prove, in order to recover, that the transaction was had with reference to her separate property. *Bentley v. Estate of Bentley*..... 803

Indictment and Information.

1. In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used. *Smith v. State*..... 345
2. If words in an information mean the same as those found in the statute denouncing the offense, the information will be upheld. *Smith v. State*..... 345
3. Allegations of an information held sufficient to charge an assault with intent to commit a robbery, and to support a judgment of conviction. *Smith v. State*..... 345
4. The language of ch. 104, laws 1899, includes instruments conveying the title to real estate. *Moline v. State*..... 361
5. An information for wife desertion under sec. 212a of the criminal code must set out both an abandonment and neglect to maintain without good cause. *Outhbertson v. State*.. 727
6. Information under sec. 125 of the criminal code held not duplex. *Moline v. State*..... 361
7. Where an information contains two or more counts charging separate offenses of the same nature, the trial court may require an election at any time before the defense is interposed. *Blair v. State*..... 501

Indictment and Information—Concluded.

8. Where an information contained three counts, each charging statutory rape, but on different dates, the first count being insufficient in law, *held* that a motion to quash the second and third was properly overruled. *Blair v. State*... 501

Infants. See RAILROADS, 1**Injunction.** See EQUITY, 1. MUNICIPAL CORPORATIONS, 8. TAXATION, 16. TRIAL.

1. An injunction by a court without jurisdiction is void. *State v. Carlson*..... 837
2. The duty of an election board to canvass votes is a statutory duty which cannot be enjoined. *State v. Carlson*..... 837
3. A taxpayer of a city cannot enjoin a franchise to a telephone company, unless the grant constitutes such a squandering of money or property of the city that taxation will be increased thereby. *Clark v. Interstate Independent Telephone Co.*..... 883
4. Evidence in a suit to enjoin a trespass *held* to sustain judgment of dismissal. *Kelley v. Boyer*..... 41

Instructions. See CRIMINAL LAW, 34-40. HOMICIDE. REPLEVIN, 2. STREET RAILWAYS, 1.

1. In an action for personal injuries, *held* not error to omit from the instructions reference to the social standing of plaintiff's mother. *City of South Omaha v. Sutcliffe*..... 746
2. Instructions *held* to not permit a recovery for loss of earnings during plaintiff's minority. *City of South Omaha v. Sutcliffe* 746
3. The use in an instruction of the phrase "a fair preponderance of the evidence" criticised, but *held* not to be prejudicially erroneous. *Link v. Campbell*..... 310
4. An instruction which submits an issue supported by insufficient evidence is erroneous. *Link v. Campbell*..... 307
5. Instructions that require plaintiff to prove substantive facts not necessary to a recovery are erroneous. *Parkins v. Missouri P. R. Co.*..... 831
6. Pleadings and evidence in an action to recover the value of horses examined, and *held* that instruction complained of was not erroneous. *Smith v. Corrigan*..... 686

Insurance. See TAXATION.

1. One who will suffer loss by the destruction of property has an insurable interest in it. *Farmers & Merchants Ins. Co. v. Mickel*..... 122
2. When an insurance company issues its policy and accepts the premium, without an application and without inquiry

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as to title to the property, and the insured has an insurable interest therein, the company is liable. *Farmers & Merchants Ins. Co. v. Mickel*..... 122

Beneficial Associations.

3. In an action upon a municipal benefit certificate, where the defense is suicide, the burden is upon the defendant to establish such fact. *Hardinger v. Modern Brotherhood of America* 860, 869
4. The question of the proximate cause of death of insured is ordinarily for the jury. *Hardinger v. Modern Brotherhood of America*..... 860
5. When circumstantial evidence is relied on to establish suicide, the defense fails unless the circumstances fairly exclude every other hypothesis of death. *Hardinger v. Modern Brotherhood of America*..... 860
6. The presumption that a sane person will not destroy his own life is a rebuttable one. *Hardinger v. Modern Brotherhood of America*..... 869
7. Proof of facts which exclude all reasonable probability of death by murder or accident establishes *prima facie* the defense of suicide. *Hardinger v. Modern Brotherhood of America* 869
8. In an action on an insurance policy, where the defense of suicide is clearly established, it is the duty of the trial court to direct a verdict for defendant. *Hardinger v. Modern Brotherhood of America*..... 869
9. If an insurance company has actual knowledge of a loss, formal notice is dispensed with. *Western Travelers Accident Ass'n v. Tomson*..... 674
10. In an action on an accident insurance policy, a denial of liability for the reason that no accident occurred, made after the time for giving notice of the accident, held not a waiver of a provision that no claim shall be valid unless written notice of the accident be given within 15 days. *Western Travelers Accident Ass'n v. Tomson*..... 661

Intoxicating Liquors.

1. A final order by a district court in a liquor license case cannot be reviewed upon appeal. *Halverstadt v. Berger*... 462
2. Under sec. 1, ch. 50, Comp. St., 1903, a licensing board, on an application to grant a liquor license, must pass upon the character and standing of the applicant, and the board cannot delegate these functions. *In re Krug*..... 576
3. The board of fire and police commissioners of a city of the

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- metropolitan class is without authority to grant a liquor license to one who has no interest in the license. *In re Krug*, 576
4. An applicant for a liquor license must be a person able, willing and competent to carry out the trust. *In re Krug*.. 576
 5. The holder of a liquor license is not estopped to deny having purchased liquors sold to persons doing business under it in his name. *Moise & Co. v. Krug*..... 43

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1. A decree directing a party to pay a specific fund into court for distribution, *held* not to be a lien upon the real estate of such party unless the decree so provides. *Campbell v. Noyes, Norman & Co.*..... 201
Campbell v. Tracy..... 548
2. In a creditor's suit the decree canceled a mortgage and ordered a bank to pay a fund into court. *Held*, That the decree did not constitute a lien on the real estate of the bank. *Campbell v. Noyes, Norman & Co.*..... 201
Campbell v. Tracy..... 548
3. A right, question or fact in issue and determined by a court cannot be relitigated between the same parties, though the second suit is for a different cause of action. *Chicago, B. & Q. R. Co. v. Cass County*..... 489
4. A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property under an assessment for a prior year. *Chicago, B. & Q. R. Co. v. Cass County*..... 489
5. If the liability of property to taxation depends on a fact determined in one action, it cannot be controverted by the same parties in a subsequent litigation. *Chicago, B. & Q. R. Co. v. Cass County*..... 489
6. Whether a railroad bridge over the Missouri river is "a part of the continuous line of road" within the meaning of secs. 39 and 40, ch. 77, Comp. St., 1901, is a question of law, and an adjudication of the question will not operate as an estoppel. *Chicago, B. & Q. R. Co. v. Cass County*..... 489
7. The overruling of a motion for leave to file a petition of intervention is not *res judicata* of the matters contained in the petition. *Hamilton Nat. Bank v. American L. & T. Co.*.. 81
8. The same rule applies to the summary overruling of objections to the discharge of a receiver. *Hamilton Nat. Bank v. American L. & T. Co.*..... 81
9. A judgment in a suit will not be a bar to a subsequent

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- suit unless the same issue is presented and the parties are the same. *Hamilton Nat. Bank v. American L. & T. Co.*.... 81
10. The holding of the federal court that a corporation was not a banking institution, held not *res judicata* of the constitutional liability of the stockholders. *Hamilton Nat. Bank v. American L. & T. Co.*..... 81
11. A judgment against a plaintiff in an action for damages for locating a road is *res judicata* of the facts alleged in a subsequent suit in equity based on the same facts. *Stocker v. Nemaha County*..... 255
12. One is not concluded by a judgment or decree in a suit to which he was not a party at the time when it was rendered. *Agnew v. Montgomery*..... 9
13. To constitute an estoppel, the issues in the prior suit must include the matters at issue in the suit where the estoppel is pleaded. *Agnew v. Montgomery*..... 9
14. Judgment conforming to "the law of the case" as established on a former hearing sustained. *Farrell v. Bouck*.... 875
15. A judgment is not a lien upon an equitable interest in real estate. *Flint v. Chaloupka*..... 34
16. The provisions of secs. 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments. *Snell v. Rue*..... 571
17. An order of the district court that a claim against an estate is equitable and not triable as a law action, held interlocutory. *Huffman v. Rhodes*..... 57
18. An interlocutory order may be vacated at a subsequent term, without compliance with the provisions of section 602 *et sequitur* of the code. *Huffman v. Rhodes*..... 57

Jurisdiction. See COURTS, 2, 3. DIVORCE.

The judge of a district court has no jurisdiction to try one charged with a felony without a jury. *Michaelson v. Beemer* 761

Jury. See CRIMINAL LAW, 41.

1. A court has a large discretion in sustaining challenges for cause of jurors. *Felsch v. Babb*..... 736
2. That a bailiff who summoned a talesman as a juror testified as a witness for the successful party is not assignable for error. *Felsch v. Babb*..... 736

Justice of the Peace.

1. A justice of the peace has no jurisdiction of an action for damages for a breach of a covenant for quiet enjoyment, where such breach consists of an eviction by one having a paramount title. *Holmes v. Seaman*..... 304

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2. A justice of the peace has jurisdiction of an action for damages for breach of covenant in a deed, when the damages do not exceed his jurisdiction and the title to land is not involved. *Holmes v. Seaman*..... 300
3. An offer to confess judgment in a suit before a justice of the peace need not be included in the transcript. *State v. Ellsworth*..... 277

Larceny. See CRIMINAL LAW, 31.

Limitation of Actions. See JUDGMENT, 16. WATERS, 4.

Lis Pendens.

1. One who, with notice, purchases real estate from a defendant in an action to recover dower, while the case is pending on appeal, takes title subject to the claim of dower. *Martin v. Abbott*..... 89
2. In such a case, where no supersedeas bond is provided for or filed, the rule is the same. *Martin v. Abbott*..... 89

Mandamus. See CARRIERS, 6-8. COSTS. MUNICIPAL CORPORATIONS, 12.

1. It is in the discretion of the supreme court to issue or refuse a writ of mandamus. *State v. Moores*..... 5
2. A peremptory writ of mandamus will not be issued, except with a view to enforce its mandates. *State v. Moores*..... 5
3. It is no defense to an application for a mandamus that action has been enjoined, if the court which issued the injunction was without jurisdiction. *State v. Carlson*..... 837
4. Mandamus will lie to compel a county treasurer to comply with the provisions of sec. 18, art. III, ch. 18, Comp. St., relating to deposits of county funds. *State v. Cronin*... 636, 642
5. Where a bridge over a stream divides two counties, it is the duty of either county, when notified by the other to join in repairs of the bridge, to either comply with the notice or refuse to do so, which duty may be enforced by mandamus. *Iske v. State*..... 278
6. Where an *ex parte* order extending the time for presenting a bill of exceptions is fraudulently obtained, a district judge will not be compelled by mandamus to allow the bill. *State v. Sornborger*..... 615

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. Evidence in an action for personal injuries caused by defective appliances, held to support the verdict. *Fremont Brewing Co. v. Schulz*..... 631

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2. It is only when the evidence is insufficient that the court is justified in instructing that negligence did not exist. *Fremont Brewing Co. v. Schulz*..... 631

Mortgages. See ATTACHMENT.

1. Where a cross-petition to foreclose a mortgage alleges that one of the defendants assumed the mortgage debt and no answer is filed, a finding that the allegations of the cross-petition are true concludes said defendant. *Smith v. Allen*... 170
2. A general prayer for equitable relief in a foreclosure petition, followed by motion and notice for a deficiency judgment, confer jurisdiction. *Smith v. Allen*..... 170
3. Where a foreclosure suit was dismissed on motion, on the ground of a prior adjudication between third parties, held error. *Gillman v. Topinka*..... 96

Municipal Corporations. See BONDS, 3. EVIDENCE, 9. NEGLIGENCE. TAXATION, 20, 22, 23.

1. Where the surface of a paved street is decayed and it is proposed to replace it on the same concrete base, it constitutes a "repaving" and not a "repairing" under the metropolitan charter. *McCaffrey v. City of Omaha*..... 583
2. Repaving of streets can be done only upon a petition of the abutting property owners. *McCaffrey v. City of Omaha*, 583
3. Under a city charter requiring 30 days' notice to property owners to designate the material to be used in repaving, the notice is jurisdictional. *Eddy v. City of Omaha*..... 550
4. Under the metropolitan city charter property owners have 30 days in which to designate by petition the material to be used in repaving. If such petition is filed, the mayor and council will not lose jurisdiction by acting on such petition before the 30 days have expired, if no other petition is filed. *Eddy v. City of Omaha*..... 561
5. Where a city charter requires notice to designate material for paving and the city relies upon a waiver of the failure to give notice, it must plead it. *Eddy v. City of Omaha*.... 550
6. Where a statute requires six days' notice of the meeting of a city council as a board of equalization, notice must be given during the six days immediately prior to the date of the meeting. *Shannon v. City of Omaha*..... 281
7. That the city attorney is the owner of lots which the city seeks to charge with a special assessment does not charge him with notice of the action of officers of the city with reference to such lots. *Shannon v. City of Omaha*..... 281
8. After an improvement is made and the cost of paving intersections is paid for, special assessments cannot be en-

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- joined because a fund for the intersections was not available at the time the improvement was ordered. *Eddy v. City of Omaha*..... 561
9. A partial estimate by the city engineer of Omaha on a paving contract, made to the board of public works and the city council, is a claim against the city under sec. 33 of the charter. *Lobeck v. State*..... 595
10. A taxpayer may appeal from the order of the city council approving and allowing such a claim to the district court. *Lobeck v. State*..... 595
11. The appeal suspends the order of the council, and during its pendency the comptroller is not required to deliver the warrant for the payment of the estimate to the claimant. *Lobeck v. State*..... 595
12. During the pendency of such appeal, mandamus will not lie to compel the delivery of the warrant. *Lobeck v. State*.. 595
13. Where a purchaser of lands subject to an apparent lien for special assessments procures title by a conveyance which recites that they are subject to the lien, which the purchaser assumes, he cannot sue in equity to set aside the tax as invalid. *Eddy v. City of Omaha*..... 550
14. Under subdiv. 63, sec. 68, ch. 15, laws of 1889, which allows special taxes to be paid before delinquency under protest, a person must pay the taxes before the whole amount is delinquent, before he is entitled to recover. *City of South Omaha v. McGavock*..... 382
15. A judgment in a proceeding under sec. 101, art. I, ch. 14, Comp. St., 1903, to detach territory from a municipality, will not be reversed in the absence of a showing of mistake of fact or law. *Michaelson v. Village of Tilden*..... 744
16. In an action for personal injuries, evidence as to the distance of the surface of a sidewalk from the ground and the slope of the ground, held to be within the issues. *City of Omaha v. Houlihan*..... 326
- Negligence.** See ESTOPPEL, 2. RAILROADS. TRIAL, 1.
1. Whether a liability arising from a breach of an ordinance accrues for the benefit of an individual or the public depends on the nature of the duty enjoined. *Frontier Steam Laundry Co. v. Connolly*..... 767
2. An ordinance which requires fireproof shutters on brick buildings within cities is for the benefit of the public. *Frontier Steam Laundry Co. v. Connolly*..... 767
3. Where property held by a bailee is destroyed by fire which spread from another building through windows unprotected

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- by fireproof shutters, in violation of an ordinance, he is not liable. *Frontier Steam Laundry Co. v. Connelly*..... 767
4. Where the proximate cause of an injury depends upon facts from which different inferences may be drawn, it is a question for the jury. *Lincoln Traction Co. v. Heller*..... 127
5. The violation of statutory or municipal regulations will sustain a private action for negligence, if the other elements of actionable negligence concur. *Lincoln Traction Co. v. Heller*..... 127
6. Negligence, contributory negligence and the proximate cause of an injury are questions for the jury, when the evidence is conflicting. *City of Omaha v. Houlihan*..... 326

New Trial. See CRIMINAL LAW, 42-48.

1. The matter of granting new trials is one of sound legal discretion. *Kleutsch v. Security Mutual Life Ins. Co.*..... 75
2. Where a second trial results as the first, error cannot be predicated on an order granting a new trial. *Kleutsch v. Security Mutual Life Ins. Co.*..... 75
3. A new trial for newly discovered evidence will not be granted where it is hearsay and incompetent. *McNeal v. Hunter* 579
4. One seeking a new trial for newly discovered evidence must show diligence. *McNeal v. Hunter*..... 579
5. In a suit in equity to obtain a new trial of an action at law, it must appear that there was a genuine controversy, a determination adverse to the party complaining, that he was by fraud or accident deprived of his right to be heard, and that he was without fault. *Zweibel v. Caldwell*..... 53
6. It must appear that an issue was presented by the pleadings and evidence. *Zweibel v. Caldwell*..... 53
- 6a. If the facts set out show the rulings complained of, it is not necessary to allege error in the trial at law. *Zweibel v. Caldwell*..... 53
7. If the petition is defective and evidence is given showing the ruling complained of, the party offering such evidence cannot object to such defect. *Zweibel v. Caldwell*..... 53
8. Where a party has, without fault, failed to obtain a transcript for a review on error in this court, a new trial will be granted. *Zweibel v. Caldwell*..... 47
9. It is not necessary to such right that error in the judgment sought to be reviewed should be alleged or proved. *Zweibel v. Caldwell*..... 47

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10. Evidence held to sustain a trial court's finding that the failure to obtain a transcript was without fault on appellant's part. *Zweibel v. Caldwell*..... 47

Notice. See ATTACHMENT, 1. INSURANCE, 9. MUNICIPAL CORPORATIONS, 3-7. TAXATION, 8, 28, 31.

- Under sec. 403 of the code proof of publication of notice of sitting of board of equalization must be made within six months. *Loneragan v. City of South Omaha*..... 317

Nuisance.

- Where a city of the metropolitan class seeks to abate a nuisance consisting of stagnant water upon vacant lots, the statute requiring notice to the owner, no jurisdiction is acquired until such notice is given. *Shannon v. City of Omaha* 281

Officers. See BONDS, 2.**Partnership.**

1. Contribution for payment of partnership debts cannot be enforced until final settlement of the partnership affairs. *Foss v. Dawes*..... 608
2. Evidence held insufficient to show a final settlement of partnership affairs. *Foss v. Dawes*..... 608
3. An agreement between two persons to engage in a business venture, which provides that one of them is to receive one-third of the net profits as compensation for his services, does not create a partnership. *Agnew v. Montgomery*..... 9

Pleading and Practice. See CARRIERS, 1, 2, 5. EVIDENCE, 6. INSURANCE, 10.

1. A defendant may set forth in his answer several grounds of defense provided they are not repugnant. *Western Travelers Accident Ass'n v. Tomson*..... 661
2. Where an answer pleads a failure to give notice, and a reply pleads a waiver and avoidance, the allegation that no notice was given is admitted. *Western Travelers Accident Ass'n v. Tomson*..... 661
2. Where the pleadings admit that no notice was given and rely upon a waiver or estoppel, the only question is whether there was a waiver. *Western Travelers Accident Ass'n v. Tomson* 661
4. A defense based upon the conditions of a policy of insurance is inconsistent with a defense which asserts that no policy was in force at the time of the loss. *Western Travelers Accident Ass'n v. Tomson*..... 661
5. A plaintiff may, subject to attack by motion or demurrer,

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- plead matter in avoidance of an anticipated defense, and may supplement the same in his reply by allegations not inconsistent therewith. *Western Travelers Accident Ass'n v. Tomson*..... 674
6. Pleadings after verdict and judgment will be liberally construed. *Western Travelers Accident Ass'n v. Tomson*..... 674
7. If an insurance company denies loss, it does not thereby waive proof of notice of the same. *Western Travelers Accident Ass'n v. Tomson*..... 680
8. When a defendant in replevin alleges title, he waives the defense of want of possession at the beginning of the action. *McGinley v. Wirthle*..... 602
9. In an action based on a breach of a contract of sale, a defendant cannot rely as a defense upon conditions in a written contract not pleaded. *Westinghouse Co. v. Meizel*.. 623
10. Defense of new matter must be pleaded. *Westinghouse Co. v. Meizel*..... 623
11. A general allegation of negligence is good against a demurrer. *Chicago, R. I. & P. R. Co. v. O'Donnell*..... 900
12. An amended petition which restates the *gravamen* of the complaint is not a departure, although the petition sounded in tort and the amendment avers a contract liability only. *Shoemaker v. Commercial Union Assurance Co*..... 650
13. Amended petition in action for personal injuries, held not to state a new cause of action. *Chicago, R. I. & P. R. Co. v. O'Donnell*..... 900
14. Amended petition in foreclosure, held to state a cause of action. *Colby v. Foxworthy*..... 378
15. The practice of amending pleadings by interlineation or erasure is not favored. *Western Travelers Accident Ass'n v. Tomson*..... 661

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- A pledge of negotiable paper to secure the payment of the purchase price of chattels vests in the vendor a lien upon it, which he may enforce in equity. *Western Fly Guard Co. v. Hodges*..... 313

Principal and Surety.

1. A defendant found to be a surety paid the judgment. Held, That he was entitled to collect the same by execution against his principal. *Nelson v. Webster*..... 332
2. In an action against a principal and surety, a finding under sec. 511 of the code that the parties are principal and surety need not be relitigated in an action to subrogate the surety

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- to the rights of the creditor against the principal. *Nelson v. Webster*..... 332
3. Sureties upon an official bond are liable for a statutory penalty incurred by their principal by taking illegal fees. *Eccles v. United States F. & G. Co.*..... 734

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Quieting Title.

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2. In an action *quia timet* pleadings and evidence held to support the judgment. *O'Neal v. Bellevue Improvement Co.*... 399

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- The remedy to set aside a franchise fraudulently granted is by *quo warranto* at the suit of the state. *Clark v. Interstate Independent Telephone Co.*..... 833

Railroads.

1. No arbitrary rule exists to fix the age at which a child is capable of understanding dangers to be encountered upon railroad tracks. Ordinarily, such question is one of fact for the jury. *Chicago, B. & Q. R. Co. v. Russell*..... 114
2. In an action against a railroad company for injuries it is proper to show a custom of the company. *Chicago, B. & Q. R. Co. v. Russell*..... 114
3. Whether a railroad company was negligent in backing its train without special warning is a question for the jury. *Chicago, B. & Q. R. Co. v. Russell*..... 114
4. Evidence in an action for injury at a crossing, held to sustain the verdict. *Chicago, B. & Q. R. Co. v. Russell*..... 114
5. Where a railroad company has established a station outside the limits of a city or village, it is not bound, under sec. 1, art. I, ch. 72, Comp. St., 1903, to fence its road at that point. *Chicago, B. & Q. R. Co. v. Seveck*..... 793
6. Failure to fence at stations is excusable only to an extent sufficient to afford the public and the railroad company necessary facilities. *Chicago, B. & Q. R. Co. v. Seveck*..... 793
7. It is the locality where animals pass onto the right of way that determines the liability of a railroad company for failure to fence. *Chicago, B. & Q. R. Co. v. Seveck*..... 793
8. The intent of sec. 1, art. I, ch. 72, Comp. St., 1903, is to require railroad companies to fence their tracks except at stations and in cities and villages. *Chicago, B. & Q. R. Co. v. Seveck*..... 799

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Sales.

1. That a contract for the sale of hay provides that it is to be paid for before taken from the farm does not prevent the title passing; it merely gives a lien for the purchase money, which may be waived. *Allen v. Rushfort*..... 907
2. Under the pleadings and evidence, *held*, that the seller waived her lien; that an action for the contract price was properly brought, and that the case should have been submitted to the jury. *Allen v. Rushfort*..... 907
3. Under the facts, *held*, that there was a waiver of the provisions of a written contract, that retention of machinery after a four-days' trial constituted an acceptance. *Westinghouse Co. v. Meizel*..... 623

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- A board of education may authorize its president to sign a petition for paving. *Eddy v. City of Omaha*..... 561

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- One cannot recover damages from a sheriff for negligence in the levy of a writ if he has contributed to the result by his own negligence. *Parrott v. McDonald*..... 97

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1. A provision in a decree of specific performance that plaintiff shall secure deferred payments is not prejudicial to defendant. *Ruzicka v. Hotovy*..... 539
2. Provisions in a decree for specific performance as to interest on deferred payments, *held* sufficient. *Ruzicka v. Hotovy* 539

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1. It is not necessary that a memorandum sufficient to evidence a sale of real estate, should be contained in a single letter. *Collyer v. Davis*..... 887
2. An undelivered deed submitted to the grantee may be considered in aid of an imperfect description in another written memorandum. *Collyer v. Davis*..... 887
3. Evidence held to show a sufficient memorandum of contract of sale of land. *Collyer v. Davis*..... 887
4. A memorandum of a contract of sale of land is not void for uncertainty in the description, if it can be made certain by parol evidence. *Ruzicka v. Hotovy*..... 589
5. In such memorandum, if the time for executing the deed, paying the consideration and giving securities are not stated these matters may be shown by parol evidence. *Ruzicka v. Hotovy*..... 589
6. A written offer to lease, signed by the lessee and accepted by the lessor, is competent evidence of a valid contract. *Butterfield v. Commercial Cattle Co*..... 605

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1. An enrolled bill found in the office of the secretary of state, signed by the officers of the legislature and approved by the governor, is *prima facie* evidence of its enactment. *Colburn v. McDonald*..... 431
2. Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted. *Colburn v. McDonald*..... 431
3. The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. *Colburn v. McDonald*..... 431
4. In order to overthrow such enrolled bill, it must be made to affirmatively appear by the legislative journals that it did not pass. *Colburn v. McDonald*..... 431

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1. In an action against a street railway company, an instruction that the burden is upon the company to prove that it was not guilty of negligence, held erroneous. *Lincoln Traction Co. v. Heller*..... 134

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2. Street railway companies are common carriers. They are required to exercise the utmost care, and are liable for the slightest negligence. *Lincoln Traction Co. v. Heller*..... 127
3. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence. *Lincoln Traction Co. v. Heller*..... 127

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2. The trial court found that the state board acted in good faith and without fraud in equalizing assessments. *Held*, That these questions are eliminated on appeal. *Hacker v. Howe* 385
3. The values found by county assessor are not conclusive. The assessments as finally made are the values found by the assessors, as corrected and equalized by the county and state boards of equalization. *Hacker v. Howe*..... 385
4. An assessment is not final until acted upon by the county and state boards of equalization, and certified to the county clerks and extended upon the tax rolls. *Hacker v. Howe*.. 385
5. An assessment is an official listing of persons and property, with an estimate of the value of the property of each for purposes of taxation. *Hacker v. Howe*..... 385
6. The state board, in the equalization of assessments between counties, acts *quasi* judicially, and its action is not subject to collateral attack except for fraud or the exercise of power not conferred upon it by law. *Hacker v. Howe*..... 385
7. The action of the state board, in the equalization of assessments between counties, in ordering a per centum of increase in the aggregate valuation of some of the counties, cannot be impeached in the absence of fraud, bad faith or usurpation of power. *Hacker v. Howe*..... 385
8. No notice is required, other than that given by statute, of the time and place of meeting or of action taken by the state board of equalization. *Hacker v. Howe*..... 385
9. The statute providing for the equalization of assessments of property is not invalid because no provision is made for an appeal to the courts. *Hacker v. Howe*..... 385
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12. Individual assessments must be corrected and equalized by county boards of equalization. *Hacker v. Howe*..... 385
13. That an individual taxpayer has returned for assessment money at its full value will not prevent the state board from raising the aggregate value of all property in the county. Provisions of this character are constitutional. *Hacker v. Howe*..... 385
14. Where the state board has increased the value of all property of the county, including money returned at its full value, such increase can affect only the one item. *Hacker v. Howe*..... 385
15. Whether a court of equity would grant relief from such overvaluation, not determined. *Hacker v. Howe*..... 385
16. In no event will an injunction against an illegal tax lie until taxes legally due are paid or tendered. *Hacker v. Howe*, 385
17. Under the first clause of sec. 1, art. IX of the constitution, property and franchises must be taxed according to valuation, and no discrimination can be made between foreign or domestic fire insurance companies. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518
18. A tax upon the gross amount of premiums received within municipalities by a foreign fire insurance company is not a tax upon property under the first clause of sec. 1, art. IX of the constitution, but is a tax upon insurance business, authorized by the second clause of said section. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518
19. Under the second clause of said section, a tax is uniform if persons subject to it are divided into classes and the law operates on the members of each class uniformly. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518
20. Sec. 6, art. IX of the constitution, provides that taxes for corporate purposes may be levied by municipal authorities, and by sec. 7 the legislature is forbidden to levy taxes for corporate uses of municipalities. *Held*, That which is forbidden to be done directly cannot be done indirectly. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518
21. Under secs. 1 or 6, art. IX of the constitution, foreign insurance companies may be treated as a class, and taxed at a rate different from that imposed upon domestic corporations. *Aachen & M. F. Ins. Co. v. City of Omaha*..... 518

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22. In the assessment of railway property for municipal purposes, such as is assessed by the state board of equalization for general revenue purposes under the provisions of secs. 39 and 40, ch. 77, art. I, Comp. St., 1901, the assessor of such city must accept the values of the state board. *State v. Back*..... 402
23. The proportional share of railway property as assessed by the state board of equalization, subject to taxation for municipal purposes, may be equalized by the proper authorities of such city. *State v. Back*..... 402
24. It is competent for the legislature to provide for the assessment of the property of a railway, required to be listed with the auditor of public accounts, by one assessing body, as an entirety, and to distribute the value on a mileage basis. *State v. Back*..... 402
25. Such plan of assessment does not violate the constitutional provision requiring uniformity of valuation and assessment. *State v. Back*..... 402
26. The assessment of the property of a railway as an entirety, and the distribution of the value on a mileage basis over the entire line does not change the situs of the property. *State v. Back*..... 402
27. The legislature may provide for assessing railway property the same as personalty, and fix its situs by its valuation as an entirety, and the distribution of the total value to districts on a mileage basis. *State v. Back*..... 402
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